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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL MAIETTA,

Petitioner,

—v.—

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a petitioner in a habeas corpus proceeding be collaterally estopped from re-litigating an issue determined adversely to him in a prior criminal case?

2. Is a petitioner in a habeas corpus proceeding barred by the doctrine that a criminal defendant may not obtain the benefit of a "new rule" of law in the context of a collateral attack upon his conviction when at the time of the petitioner's conviction (a) no fewer than five circuits had embraced the principle petitioner advocates and (b) there was no binding precedent in the circuit in which the matter was pending?

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PRELIMINARY STATEMENT

Petitioner, Michael Maietta ("Maietta"), respectfully petitions this Court to issue a writ of certiorari to review the May 15, 1996 ruling of the United States Court of Appeals for the Second Circuit (Newman, C.J., Lumbard and Kearse, JJ.), affirming the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2253.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is officially reported at 84 F.3d 100 and is reprinted in the appendix (Pet. App. 1a-6a). The opinion of the Southern District of New York is not officially reported and is reprinted in the appendix (Pet. App. 7a-13a).

JURISDICTION

The court of appeals issued its decision on May 15, 1996. (Pet. App. 1a.) This Court has jurisdiction to entertain this application pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Proceedings in the Trial Court

This case arises out of four burglary-related indictments against Maietta. On March 11, 1991, Maietta agreed to withdraw his prior pleas of not guilty as to each of the four indictments and to plead guilty to one count under each. (Pet. App. 48a-49a.) As part of the plea agreement, the court promised Maietta that the sentences on the four counts to which he pled guilty would be structured so that Maietta would receive, in the aggregate, a sentence of four to eight years imprisonment.

The court identified three conditions for imposition of the agreed-upon sentence: Maietta was required (1) to appear for sentencing on the scheduled date; (2) to cooperate with the probation department; and (3) to avoid getting re-arrested prior to sentencing. (Pet. App. 49a, 60a-61a.) There is no dispute that Maietta fulfilled the first two of those conditions; only the third is in issue. With respect to the third condition, the court had stated at the time of the plea that an "erroneous arrest" would not be considered a breach. (Pet. App. 50a.) The court stated that the consequence of re-arrest -- other than an "erroneous arrest" -- would be that Maietta would not be permitted to withdraw his pleas and would "just get an enhanced sentence of 22 years in State's prison . . . ." (Pet. App. 61a.)

At sentencing, the prosecutor presented the court (Pet. App. 68a) with a Westchester County (New York) Indictment, in which Maietta was charged with having committed burglary in the second degree and related crimes on March 28, 1991. Maietta maintained his innocence of the crimes charged in the Westchester indictment. (Pet. App. 74a-79a)

The Westchester case concerned a burglary in which a Jeep owned by Maietta was alleged to have been used as a

"getaway" vehicle. (Pet. App. 74a.) Westchester County police contended that Maietta was the driver of the Jeep based on an alleged viewing of the driver by an off-duty police officer. (Pet. App. 75a.) No one was apprehended at the scene of the crime, however, and Maietta was not arrested until one week after the alleged burglary. (Pet. App. 75a.)

Maietta's counsel offered a statement signed by Anthony Salveggi, who stated that he, not Maietta, was the driver of the Jeep, and that Maietta had no involvement whatsoever in the Westchester incident. (Pet. App. 74a-75a.) Counsel further advised the court that Salveggi was prepared to testify as to the facts set forth in his statement -- *facts that completely exculpated Maietta.* (Pet. App. 74a-75a.) Maietta's counsel further informed the court that three additional witnesses were willing to testify that, at the time of the Westchester incident, Maietta was working with them at their carpet store in the Bronx. (Pet. App. 75a.) The prosecutor did not contest any of the statements made by Maietta's counsel, nor did he offer any proof that Maietta was involved in the Westchester incident other than the facts of the arrest and indictment.

Maietta's counsel argued that enhancing sentence solely on the basis of the Westchester arrest and indictment would constitute a denial of Maietta's right to due process of law, and requested alternatively (a) that Maietta be sentenced to the promised term of 4 to 8 years (Pet. App. 78a-79a), (b) that a hearing be held to examine the basis of the arrest and indictment (Pet. App. 76a-78a), (c) that Maietta be allowed to withdraw his guilty pleas (Pet. App. 79a), and (d) that, if Maietta were acquitted of the Westchester charges, he be re-sentenced to 4 to 8 years imprisonment (Pet. App. 79a). The court summarily denied all of these applications. (Pet. App. 79a.)

Notwithstanding the offer of exculpatory proof and the absence of any contrary factual presentation by the prosecutor,

the court proceeded to enhance Maietta's sentence. (Pet. App. 83a.) The court summarily sentenced Maietta to four consecutive, indeterminate terms for an aggregate sentence of 10 to 20 years imprisonment. (Pet. App. 84a.)

Proceedings in the Appellate Division

The judgments were affirmed by a divided (3-2) panel of the Appellate Division, First Department. *People v. Maietta*, 173 A.D.2d 17 (1st Dep't 1991), *aff'd sub nom. People v. Outley*, 80 N.Y.2d 702 (1993). The majority, upholding the imposition of an enhanced sentence, held that Maietta understood the implications of the conditions imposed on the plea agreement, including the condition that he not be arrested prior to sentence, and that the condition was breached by the subsequent arrest. (Pet. App. 37a-38a; 173 A.D.2d at 22.) While the court held that Maietta's insistence that he was innocent of the Westchester charges was entitled to no weight (Pet. App. 39a; 173 A.D.2d at 23-24), the majority opinion did not cite a single case in which a defendant who contested the validity of a post-plea arrest was nonetheless automatically given an enhanced sentence for violation of a no-arrest condition.

The two dissenting justices were unwilling to accept the mechanical approach embraced by the sentencing court and the Appellate Division majority:

> It is well established that a defendant is entitled to an opportunity to refute routine, aggravating factors in a probation report which may negatively influence the court in sentencing. In these circumstances, where the consequences of defendant's commission of a post plea crime are so substantial under the terms of the plea arrangement itself, it is incumbent upon the sentencing court to conduct a hearing to resolve the disputed factual contentions.

(Pet. App. 43a; 173 A.D.2d at 27.) The dissent further rejected the sentencing court's reliance on the fact of an indictment as being "sufficient protection against the possibility of imposition of an enhanced sentence based upon an erroneous arrest," given the one-sided nature of the grand jury proceeding. (Pet. App. 44a; 173 A.D.2d at 28.) The dissent explained:

> This is not to say that the prosecution must establish defendant's commission of a post plea crime beyond a reasonable doubt in order to enforce the plea arrangement to the extent of having the enhanced sentence imposed. The "preponderance of the evidence" standard should be applicable to such a hearing, as is with respect to other disputed factual matters in sentencing which are legitimately the subject of an adversarial hearing. The prosecution, however, should not obtain enforcement of the more onerous, enhanced sentence, in the face of defendant's substantiated denial, without a showing that defendant committed a post plea crime.

(Pet. App. 44a-45a; 173 A.D.2d at 28 (citing *United States v. Lee*, 818 F.2d 1052 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987)).)

The Westchester Plea

On March 23, 1992, following the Appellate Division's affirmance of his sentence and under pressure to go to trial on the Westchester indictment, Maietta agreed to plead guilty in Westchester County to three burglary-related crimes. As explained in Maietta's habeas corpus petition (Pet. App. 84a) (emphasis supplied):

> He [entered his guilty plea in Westchester County] only because the agreement provided an indeterminate sentence of 5 to 10 years that

> would run *concurrently* with the 10 to 20 years he is currently serving in the instant case, and therefore would not result in any additional incarceration time. Having lost faith in the justice system, Maietta simply desired to minimize the risk of significant additional prison time. Although Maietta maintains his innocence in the Westchester case, he pleaded guilty because he felt this was the only sensible decision under the circumstances.

Proceedings in the New York Court of Appeals

In February 1993, a five-judge panel of the New York Court of Appeals affirmed the Appellate Division's order. *People v. Outley*, 80 N.Y.2d 702 (1993) (Pet. App. 17a-30a). The court held that when there is an issue as to whether the defendant breached the no-arrest condition of a plea bargain by getting arrested, due process requires that the court conduct an inquiry where the defendant has an opportunity to show that the arrest is without foundation. The Court of Appeals opined that "[t]he nature and extent of the inquiry -- whether through a summary hearing pursuant to CPL § 400.10 or some other fair means -- is within the court's discretion." (*Id.* at 713; Pet. App. 29a.) However, the Court of Appeals concluded that the trial court had taken sufficient steps to satisfy Maietta's due process rights.

The Court of Appeals agreed with Maietta that the sentencing judge could not simply enhance the sentence based only upon the mere fact of the arrest: "[a] no-arrest condition could certainly not be held to have been breached by arrests which are malicious or merely baseless." (*Id.*; Pet. App. 28a.) Furthermore, the sentencing court's inquiry must be of "sufficient depth . . . so that the [lower] court can be satisfied . . . of the existence of a legitimate basis for the arrest on that charge." (*Id.*; Pet. App. 29a.) However, the Court of Appeals failed to specify either the standard of proof the government

must meet, or form that the inquiry must take (i.e., hearing). According to the Court of Appeals, "the nature and extent of the inquiry -- whether through a summary hearing pursuant to CPL § 400.10 or some other fair means -- is within the court's discretion." (*Id.*; Pet. App. 29a.)

Applying the holdings to the facts of Maietta's case, the Court of Appeals erroneously concluded that the sentencing court's inquiry into the arrest was sufficient to conclude that Maietta did breach the no-arrest condition of the plea agreement, that the standards of due process were satisfied, and that the enhanced sentence was justified.

The Federal Habeas Corpus Petition

On March 9, 1994, Maietta applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, contending that he is being unlawfully detained and restrained of his liberty by virtue of the constitutional errors of the New York State courts. In an opinion filed on August 22, 1995 (Pet. App. 7a-13a), the district court denied the petition on the ground that the "petitioner seeks the announcement and application of a new rule" of criminal procedure within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989). (Pet. App. 11a.) The district court thereafter issued a certificate of probable cause, allowing petitioner to appeal the denial of his habeas petition to the Court of Appeals under 28 U.S.C. § 2253. (Pet. App. 15a-16a.)

The Opinion of the Second Circuit

The Second Circuit predicated its affirmance on the sole conclusion that petitioner's "guilty plea to the Westchester charge precludes his challenge to the validity of his arrest on that charge . . . ." (Pet. App. 5a.) The court acknowledged that other circuits, such as the Third Circuit, had held that a criminal defendant cannot be collaterally estopped from relitigating an issue previously determined adversely to him in

another proceeding, *see United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), and that the issue has "divided the few courts of appeals that have considered the question." (Pet. App. 5a-6a.)

The court attempted to disavow any reliance on this disputed doctrine, however, stating that the *Maietta* case did not involve a "subsequent jury trial of a criminal case," but rather involved a "challenge to the validity of an arrest that is used only for purposes of sentencing in a different criminal case." (Pet. App.. 6a.) However, notwithstanding the court's denial, a fair reading of the decision leads to the inescapable conclusion that the court in fact reflexively applied the doctrine of collateral estoppel to preclude Maietta from arguing, in the context of the habeas corpus proceeding, that he had not been guilty of any wrongdoing in connection with the Westchester arrest that resulted in the enhancement of his sentence.

SUMMARY OF REASONS FOR GRANTING THE WRIT

A.

As discussed in Point I below, the petition should be granted to resolve a conflict among the circuits on a compelling issue of federal law, specifically, whether collateral estoppel can be applied offensively against criminal defendants. Although this Court has upheld the application of *defensive* collateral estoppel in criminal cases, *see Ashe v. Swenson*, 397 U.S. 436 (1970), and has cautioned against automatic application of offensive collateral estoppel in civil cases, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), it has never had the occasion to address the constitutionality of applying *offensive* collateral estoppel against criminal defendants. Accordingly, this case presents this Court with the opportunity to enunciate constitutional guidelines concerning the use of collateral estoppel adverse to criminal defendants.

B.

As discussed in Point II below, this Court would also have the opportunity to clarify its ruling in *Teague v. Lane*, 489 U.S. 288 (1989), and decide whether the relief that Maietta seeks is barred by the doctrine that a defendant may not obtain the benefit of a "new rule" of law in the context of a collateral attack upon his conviction, notwithstanding the fact that at the time of his conviction no fewer than five circuits required a trial court to conduct an evidentiary hearing when the defendant challenged information to be relied upon in the sentencing process.

ARGUMENT

POINT I

THE CIRCUITS ARE DIVIDED AS TO WHETHER OFFENSIVE COLLATERAL ESTOPPEL CAN BE APPLIED AGAINST CRIMINAL DEFENDANTS

A. The Second Circuit's Decision Constitutes an Unwarranted Expansion of Current Legal Doctrine and Directly Conflicts With Decisions from the Third and Eleventh Circuits.

Until recently, most courts assumed that collateral estoppel could only work to the benefit of a criminal defendant. This assumption arises out of this Court's decision in *Ashe v. Swenson*, 397 U.S. 436 (1970), which held for the first time that collateral estoppel could be employed in a criminal case. The decision below, however, seemingly ignores the fundamental precept that criminal cases present considerations different from those of civil cases. *See Standefer v. United States*, 447 U.S. 10, 22 (1980). Without any analysis of whether application of offensive collateral estoppel against criminal defendants would violate the due process guarantees of the Fifth and Fourteenth Amendments, the Second Circuit mechanistically held that petitioner's conviction on the Westchester charge "precludes [a] challenge to the validity of [the] arrest . . . ." (Pet. App. 5a.)

As support for its proposition that collateral estoppel can be applied *generally* against criminal defendants, the Second Circuit cited decisions from the Eighth and Ninth Circuits, *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976), and *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968). Both of these decisions involved alleged illegal aliens who were charged with entry into the United States after having been deported in

violation of 8 U.S.C. § 1326. Both defendants had been previously convicted of crimes requiring determinations that they were aliens at the time of conviction. *Hernandez-Uribe*, 515 F.2d at 21; *Pena-Cabanillas*, 394 F.2d 787. Both cases relied on the reasoning of an earlier district court case, *United States v. Rangel-Perez*, 179 F. Supp. 619, 625 (S.D. Cal. 1959), which held that:

> wise public policy . . . and common-sense judicial administration . . . combine to advocate application of collateral estoppel against a defendant in a criminal case, at least as to certain issues . . . . Issues as to status, for example, would seem most appropriate for application of the doctrine . . . .

The concern in *Rangel-Perez* was that illegal aliens, whose status had been fully litigated before they were deported, could simply return and relitigate their status *ad infinitum* unless collateral estoppel were used offensively against them. *Id.* at 626. Here, in contrast, Maietta is not in any position to relitigate the issue of his participation in the Westchester incident, much less to relitigate the issue *ad infinitum*. Consequently, the alienage cases relied upon by the Second Circuit are inapposite.[1]

The decision below, moreover, is in direct conflict with decisions of the Third and Eleventh Circuits holding that, in criminal cases, the requirements of due process outweigh the

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[1] Our research has uncovered an additional court of appeals decision, not cited by the Second Circuit, applying collateral estoppel against a criminal defendant. *See United States v. Colacurcio*, 514 F.2d 1 (9th Cir. 1975). After noting that the defendant had received the rights of cross-examination and trial by jury at his first trial, the *Colacurcio* court summarily extended the rationale of the alienage cases to criminal cases generally. *Id.* at 6.

purported benefits of judicial efficiency identified in *Rangel-Perez*. For example, while the Third Circuit based much of its decision in *United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994), on the criminal defendant's right to a trial by jury, the court also examined the policy arguments used in *Pena-Cabanillas* to support the use of offensive collateral estoppel and found them wanting. *Id.* at 892-93. Whereas in civil cases the "prompt resolution of the claims and finality are desirable," the court noted, in criminal cases such objectives are less important. *Id.* at 893. The criminal defendant, unlike the civil litigant, "'has at stake [an] interest of immense importance,'" one that outweighs a number of other concerns more compelling than judicial efficiency and finality. *Id.* (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). The Third Circuit concluded that "the liberty interest of a criminal defendant takes priority over the usual concerns for efficient judicial administration so often found in civil proceedings." *Id.*

Likewise, the Eleventh Circuit has held that the automatic application of collateral estoppel to criminal defendants without any procedural safeguards violates due process. In *United States v. Harnage*, 976 F.2d 633 (11th Cir. 1992), the Eleventh Circuit held that invocation of offensive collateral estoppel would require a district court to engage in a detailed analysis of various factors to balance due process concerns against the purported benefits of denying defendants the right to litigate issues previously resolved against them. The court reasoned that the sort of detailed fact-finding that would be necessary to determine such issues would "completely defeat[] the doctrine's goal -- judicial efficiency and economy." *Harnage*, 976 F.2d at 636. Thus, once the necessary safeguards were taken into account, the Eleventh Circuit found offensive collateral estoppel to be self-defeating.

In sum, the Second Circuit's automatic application of offensive collateral estoppel, ostensibly in reliance on decisions from the Eighth and Ninth Circuits, is squarely in conflict with

decisions from the Third and Eleventh Circuits. This split among the circuits warrants the attention of this Court.

B. The Second Circuit's Procedural Ruling Wrongfully Divested Petitioner of his Right to Appeal Notwithstanding that a Certificate of Probable Cause had been Issued.

A denial of a writ of habeas corpus by a district court may not be appealed to the Court of Appeals without a certificate of probable cause. *See* 28 U.S.C. § 2253. Once, as here, a district or other federal judge has issued such a certificate (Pet. App. 15a-16a), however, "petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

Recently, in *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996), this Court held that the right of a habeas petitioner to have a certified appeal heard on the merits cannot be overridden by "special ad hoc 'equitable' reasons," reasons not derived from "statutes, rules, and precedents." *Id.* at 1298. This is especially important, this Court held, when the Courts of Appeals are considering a first habeas petition. *Id.* at 1299. "Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.* (original emphasis).

The Second Circuit's extension of collateral estoppel to Maietta's first habeas petition is unprecedented. No other court has held that collateral estoppel can be applied to preclude a petitioner's first habeas appeal, no statutory authority supports the panel's decision, and no habeas rule exists to allow it to collaterally estop a first-time habeas petitioner. The decision therefore constitutes an "ad hoc 'equitable' reason[]" of the very sort this Court sought to

discourage in *Lonchar,* and thus is in direct conflict with a decision of this Court.

The Second Circuit's procedural ruling denied petitioner his right under 28 U.S.C. § 2253 to appeal the denial of a writ of habeas corpus even though a certificate of probable cause has issued. The Second Circuit's break from the established procedures of habeas appeals merits resolution by the Court.

POINT II

MAIETTA DOES NOT SEEK THE ADOPTION OF A "NEW RULE" OF LAW

The district court dismissed the petition on the ground that requiring an evidentiary hearing in these circumstances would constitute a "new rule" of constitutional law, barring relief under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny.[2] We urge this Court to take this opportunity to clarify its decision in *Teague* and hold that the "new rule" doctrine does not apply when at the time of the conviction at issue the principle petitioner advocates was the prevailing state of federal law and where there was no binding precedent in the circuit in which the matter was pending.

A. Whether a Defendant Has Breached an Obligation Under a Plea Agreement Must be Determined at an Evidentiary Hearing.

A plea agreement is a contract "in which special due process concerns for fairness and the adequacy of procedural safeguards obtain." *United States v. Ataya*, 864 F.2d 1324, 1329 (7th Cir. 1988); *see generally Santobello v. New York*, 404 U.S. 257, 261-62 (1971). Because a defendant waives substantial constitutional rights by entering into a plea agreement, including the Fifth Amendment privilege against self incrimination, nearly all the safeguards that attend prosecution in a criminal trial, the right to a trial by jury, and the right to confront adverse witnesses, *see Innes v. Dalsheim*, 864 F.2d 974, 977 (2d Cir. 1988), *cert. denied*, 493 U.S. 809 (1989), fundamental principles of due process prohibit the government or the court arbitrarily from depriving the defendant of what it has promised. *United States v. Gonzalez-Sanchez*, 825 F.2d 572, 578 (1st Cir.), *cert. denied*, 484

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[2] This issue was fully briefed in the Second Circuit but not reached by the court in its decision.

U.S. 989 (1987) (a defendant has a constitutional interest in the enforcement of his plea agreement).

In view of these pronouncements, at least five circuits have stated unequivocally -- prior to Maietta's conviction -- that due process requires that questions as to whether a defendant has breached his obligations under a plea agreement be resolved at an evidentiary hearing. *See United States v. Cifuentes*, 863 F.2d 1149, 1155 (3d Cir. 1988); *United States v. Packwood*, 848 F.2d 1009, 1011 (9th Cir. 1988); *United States v. Verrusio*, 803 F.2d 885, 894 (7th Cir. 1986); *United States v. Brown*, 801 F.2d 352, 355 (8th Cir. 1986); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981), *cert. denied*, 451 U.S. 1018 (1982) *and* 454 U.S. 831 (1981).

In *Verrusio*, for example, the defendant pled guilty to one count of an indictment in exchange for a dismissal of other charges. The defendant also agreed to testify before the grand jury and, if necessary, at the trials of his alleged co-conspirators. The government initially agreed not to file additional charges against the defendant, but later felt that the defendant was not truthful in his grand jury testimony. He was thereafter indicted on other charges. The Seventh Circuit reversed the indictments and remanded the case for a full evidentiary hearing at which the government was required to prove by a preponderance of the evidence that the defendant breached the plea agreement. *Verrusio*, 803 F.2d at 894-95.

Due to the significant constitutional rights a defendant waives, neither the prosecution nor the court should be allowed to renege on the agreement without giving the defendant a chance to defend himself, especially where the defendant presents a "sufficiently definite, specific, detailed, and nonconjectural . . . claim" that directly contradicts the allegations. *United States v. Packwood*, 848 F.2d at 1010. Granting the defendant a hearing resolves all questions whether the court comported with the requirements of due

process; anything short of a hearing may not be adequate under the Constitution.[3]

Thus, at the time of Maietta's conviction a consistent body of federal precedent (outside of the Second Circuit) recognized the need for an evidentiary hearing to resolve questions as to whether a defendant has breached his obligations under a plea agreement. As discussed in Part B, the precedents in the Second Circuit were not to the contrary.

B. No Second Circuit Precedent Rejected the Need for an Evidentiary Hearing.

The importance of protecting the defendant's due process rights during sentencing was unquestionably recognized by the Second Circuit; the court has observed that a defendant's interests in these circumstances are greatest because his sentence in large measure determines his destiny. "[D]ue process requires that a convicted person not be sentenced on 'materially untrue' assumptions or 'misinformation.'" *United States v. Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986) (citation omitted). Thus, "*a sentencing court is required to assure itself that the information upon which it relies when fixing sentence is reliable and accurate.*" *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987) (emphasis supplied).

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[3] A defendant's rights in this situation do not derive solely from his plea agreement. A finding that a defendant breached a plea bargain can adversely impact his sentence, and it is unquestionable that a convicted defendant who appears before a judge for sentencing, a critical stage in a criminal proceeding, retains his due process rights. *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (a criminal defendant has a due process right not to have his sentence based on "materially false" information).

Moreover, it was well established in the Second Circuit that "a sentencing court is required to assure itself that the information upon which it relies when fixing sentence is reliable and accurate." *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987). Although in that case the Second Circuit stated in *dicta* that a "full-blown evidentiary hearing" to prove the alleged act was constitutionally mandated in the circumstances presented,[4] it did embrace the fundamental precept that a defendant has the right to challenge the accuracy of the government's proffered facts regarding his participation in the sentence enhancing crime and that an evidentiary hearing is an appropriate forum for resolving such disputes. *Lee*, 818 F.2d at 1056.

The Second Circuit's remark in *Lee* thus does not constitute a rejection of or in any way derogate from the great weight of authority mandating a hearing in these

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[4] In *Lee*, the defendant claimed that his constitutional rights were violated because the sentencing court relied on a finding in a presentence report that he participated in a particular racketeering act -- which he denied committing -- without proof that he committed such an act. The district judge in *Lee* had in fact offered the defendant the opportunity for an evidentiary hearing to "put the government to its proof," 818 F.2d at 1056, but the defendant declined it, presumably for tactical reasons. In light of the defendant's waiver, it was unnecessary for the Second Circuit to decide whether to join its sister circuits in concluding that the Constitution did require an evidentiary hearing in the circumstances. Here, there is no question that Maietta was denied his due process rights. He did more than just summarily deny the allegations. His offer of proof, never rebutted by the prosecution, presented a specific, detailed, and non-conjectural claim that directly contradicted the prosecution's evidence that he committed the post-plea crime. Nevertheless, Maietta did not receive the evidentiary hearing viewed by many circuits -- and routinely conducted in the Second Circuit -- as essential to his due process rights.

circumstances. Certainly, requiring a hearing would not have been inconsistent with the law in the Second Circuit. *See United States v. Merritt*, 988 F.2d 1298, 1303-04 (2d Cir.), *cert. denied*, 508 U.S. 961 (1993).

C. In any Event, an Exception to *Teague* is Applicable Here.

Even if what Maietta were requesting here was the adoption of a "new rule" of law, an exception to *Teague* would nevertheless have permitted the court to afford him the relief he seeks. *Teague* permits the retroactive application of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *See Saffle v. Parks*, 494 U.S. 484, 495 (1990) (quoting *Teague*). Ensuring the accuracy of information relied upon by a sentencing court is plainly such a "watershed rule." *See generally Santobello v. New York*, 404 U.S. 257 (1971); *Townsend v. Burke*, 334 U.S. 736 (1948); *United States v. Pugliese*, 805 F.2d at 1123. Because a defendant waives substantial constitutional rights by entering into a plea agreement, including (of particular relevance here) the right to confront adverse witnesses, *see Innes v. Dalsheim*, 864 F.2d 974, 977 (2d Cir. 1988), *cert. denied*, 493 U.S. 809 (1989), the constitution prohibits the government or the court from reneging on its promise without establishing a basis for doing so. *See generally United States v. Gonzalez-Sanchez*, 825 F.2d 572, 578 (1st Cir.), *cert. denied*, 484 U.S. 989 (1987).

Depriving Maietta of a fair chance to challenge the accuracy of information presented to the sentencing court denied him a "watershed right" guaranteed to him under the United States Constitution. For this reason, even if Maietta was requesting the adoption of a "new rule" of law, the federal courts would not be barred by *Teague* and its progeny from granting the relief we seek.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Steven C. Krane
Counsel of Record

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Counsel for Petitioner

August 7, 1996

APPENDIX

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[DECISION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1323 -- August Term 1995

Argued: February 22, 1996
Decided: May 15, 1996

Docket No. 95-2673

[REPORTED AT 84 F.3D 100]

MICHAEL MAIETTA,

Petitioner-Appellant,

v.

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Respondent-Appellee.

Before: NEWMAN, *Chief Judge*, LUMBARD and KEARSE, *Circuit Judges*.

Appeal from the September 5, 1995, judgment of the United States District Court for the Southern District of New York (Lawrence M. McKenna, Judge) denying appellant's petition for a writ of habeas corpus to challenge his state court sentence.

Affirmed.

Steven C. Krane, New York, N.Y. (Pamela B. Silverman, Proskauer Rose Goetz & Mendelsohn, New York, N.Y., on the brief), for petitioner-appellant.

Lisa I. Cuevas, Asst. Dist. Atty., Bronx, N.Y. (Robert T. Johnson, Dist. Atty., Joseph N. Ferdenzi, Allen H. Saperstein, Asst. Dist. Attys., Bronx, N.Y., on the brief), for respondent-appellee.

JON O. NEWMAN, *Chief Judge*:

The issue on this appeal concerns the preclusive effect of a guilty plea in the context of successive criminal prosecutions. The precise issue is whether a guilty plea forecloses a challenge to the validity of an arrest under circumstances where not being arrested is a condition of a plea agreement governing sentencing on an unrelated charge. The issue arises on an appeal by Michael Maietta from the September 5, 1995, judgment of the District Court for the Southern District of New York (Lawrence M. McKenna, Judge) denying his petition for a writ of habeas corpus to challenge a state court sentence. Because the guilty plea eliminates any issue of the validity of the arrest, at least for purposes of demonstrating Maietta's breach of the plea agreement, we affirm.

Background

Maietta pled guilty in Bronx County Supreme Court to four counts of burglary-related crimes. The plea agreement provided that Maietta's sentence would be within a range of four to eight years, provided that he met certain conditions including not being arrested while at liberty awaiting sentencing. The state court trial judge warned Maietta that, if he did not satisfy the conditions of the agreement, he would receive the maximum sentence. When defense

counsel pointed out that, on a prior occasion, Maietta had been arrested, apparently without foundation, and released within a few days, the trial judge responded that "if he gets arrested and the case is dismissed within three days of the arrest," the Court would not find the no-arrest condition violated. The Court later stated to Maietta, "I am warning you . . ., you get arrested again, not convicted but arrested again, you face significant time in jail."

Only a few weeks after entering the plea, Maietta was arrested for a burglary in Westchester. The arrest was based on evidence that Maietta's Jeep was observed parked in front of a residence in Yonkers, which the Jeep passenger then attempted to burglarize. A police officer on the scene later identified Maietta as the driver of the vehicle.

At sentencing on the Bronx charge, Maietta sought to offer evidence that he had not been the driver of the Jeep in Westchester. His evidence consisted of a signed but unsworn statement by Anthony Salveggi that he, not Maietta, was the driver, and three statements from alibi witnesses. The sentencing judge declined to consider the evidence and proceeded to impose a sentence of ten to twenty years imprisonment. The sentencing judge stated:

> I made it extremely clear that if the defendant was rearrested, rearrested I emphasize, not convicted, not indicted, not pursuant to a subsequent hearing, but rearrested period, that I was going to enhance his sentence and give him the maximum sentence allowed under the law. . . .
>
> . . . .
>
> . . . In this case, not only was the defendant arrested but he was subsequently indicted so that there is an additional filter for the quality of the arrest, and not only was he arrested and not only was he indicted, but he was arrested

> and indicted for things that he does professionally, burglary.

In the Appellate Division, Maietta argued that the Bronx sentencing judge should have imposed the four-to-eight-year sentence, or at least conducted an evidentiary hearing to determine whether the Westchester arrest was valid. The Appellate Division affirmed the sentence because, among other reasons, an evidentiary hearing would be duplicative of the forthcoming Westchester criminal proceedings. *People v. Maietta*, 173 A.D.2d 17, 24, 578 N.Y.S.2d 529, 533-34 (1st Dept. 1991).

Maietta subsequently pled guilty to the Westchester charge. At the plea allocution, he explicitly admitted that he was the person who had committed the Westchester burglary. He now asserts that he pled guilty only because he had lost faith in the criminal justice system, he did not wish to risk receiving a longer sentence after a trial, and he understood that he would serve his Westchester sentence concurrently with his Bronx sentence.

In the New York Court of Appeals, Maietta argued that the Bronx sentencing court had deprived him of due process by failing to hold an evidentiary hearing to establish the validity of the Westchester arrest. The Court of Appeals held that, when a defendant denies post-plea criminal conduct, the sentencing court must conduct an "inquiry" to permit the defendant to show that the arrest is unfounded. However, the Court rejected Maietta's claim that this inquiry must be a full evidentiary hearing. The Court found that the sentencing judge had inquired sufficiently by noting Maietta's ownership of the crime vehicle, the eyewitness identification, and the grand jury indictment.

The District Court denied Maietta's subsequent habeas corpus petition on the ground that according Maietta a federal constitutional right to challenge the validity of his arrest for purposes of the plea agreement would constitute a

"new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).

Discussion

On appeal, Maietta alleges that his due process rights were violated by the state court that sentenced him to the maximum penalty on the Bronx charge because the Westchester arrest was considered to be a violation of the plea agreement governing the Bronx charge. Maietta claims that the Westchester arrest was based on mistaken identity, and that the Bronx sentencing court should have conducted an evidentiary hearing to determine whether the arrest was valid. We affirm the denial of habeas corpus on the ground that, in the circumstances of this case, Maietta's guilty plea to the Westchester charge precludes his challenge to the validity of his arrest on that charge, at least for the limited purpose of determining his breach of the plea agreement governing the Bronx charges.

Though collateral estoppel has been applied from one criminal proceeding to another *for the benefit* of the accused, *see Ashe v. Swenson*, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970), whether the doctrine may be applied *against* the accused has divided the few courts of appeals that have considered the question.[1] The Eighth and Ninth Circuits have

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[1] Application of collateral estoppel from a criminal proceeding to a subsequent civil proceeding is not in doubt. "It is well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978). *See also, LaMagna v. United States*, 646 F.2d 775, 778 (2d Cir.) ("plea of guilty . . . was an admission of all the elements of a formal criminal charge, and was itself a conviction as conclusive as a jury verdict"), *cert. denied*, 454 U.S. 898, 102 S.

held that a prior conviction that necessarily determines a defendant's alienage has collateral estoppel effect on the issue of alienage in a subsequent criminal prosecution. *See Hernandez-Uribe v. United States*, 515 F.2d 20, 21 (8th Cir. 1975), *cert. denied*, 423 U.S. 1057 (1976); *Pena-Cabanillas v. United States*, 394 F.2d 785, 787 (9th Cir. 1968). On the other hand, the Third Circuit has held that the Sixth Amendment's guarantee of a jury trial entitles a defendant to have every fact necessary to a conviction determined by a jury, including a fact determined by a prior jury. *See United States v. Pelullo*, 14 F.3d 881 (3d Cir. 1994).

We need not decide whether a fact necessarily found adversely to a criminal defendant has collateral estoppel effect in a subsequent jury trial of a criminal case, because in the pending case the issue is whether the defendant's conviction precludes this challenge to the validity of an arrest that is used only for purposes of sentencing in a different criminal case. Maietta's guilty plea to the Westchester charge precludes a challenge to the validity of the arrest because the conviction following the guilty plea constitutes an adverse adjudication of the merits of the only issue that Maietta sought to dispute at his sentencing of the Bronx charge -- the identity of the perpetrator of the Westchester crime. His reasons for tendering that plea do no diminish the preclusive effect of the resulting conviction.

The judgment of the District Court is affirmed.

Ct. 379 (1981). We have also ruled that, even where the requirements for collateral estoppel are not met, common law principles preclude a challenge to the validity of an arrest after a guilty plea, for purposes of a civil suit under 42 U.S.C. § 1983. *See Cameron v. Fogarty*, 806 F.2d 380, 386-89 (2d Cir. 1986); *see also Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995) (same as to *Bivens* lawsuit).

[DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL MAIETTA,

Petitioner,

-against-

94 Civ. 1592 (LMM)
MEMORANDUM
AND ORDER

FRANK IRVIN, Warden,
Wende Correctional Facility,

Respondent.

McKENNA, D.J.

Petitioner, Michael Maietta ("Maietta"), petitions for a writ of habeas corpus. For the reasons set forth below, the petition is denied.

1.

On March 11, 1991 Maietta pled guilty to four counts of burglary.[1] The presiding judge, Justice Gerald Sheindlin of the Supreme Court of the State of New York, County of the Bronx, accepted the plea on the express condition that Maietta not be *arrested* while released pending

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[1] For purposes of this petition, the facts are uncontested. The Court takes them from the opinions of the Supreme Court, Appellate Division, *New York v. Maietta*, 578 N.Y.S.2d 529 (App. Div. 1991), and the New York Court of Appeals, *New York v. Outley*, 594 N.Y.S.2d 683 (1993). Where necessary, the Court has included passages from Maietta's two appearances before Justice Sheindlin with appropriate references to the appendix.

sentencing. While he impressed upon Maietta that he would consider *any* arrest to be a violation of the plea agreement, the judge assured him that he would not consider an arrest that was dismissed within three days.

Two weeks later there occurred, in neighboring Westchester County, an attempted burglary. After Maietta's jeep was identified as the vehicle at the crime scene and after an off-duty police officer identified Maietta as one of the burglars, the police arrested Maietta and charged him with burglary. Maietta was subsequently indicted by a Westchester County Grand Jury.

At his sentencing for the Bronx burglaries, the prosecutor introduced evidence of Maietta's arrest and indictment for the Westchester burglary. Maietta strenuously denied his guilt and offered to introduce exculpatory evidence.[2] After listening to Maietta's offer of evidence, Justice Sheindlin denied Maietta's request to conduct a hearing and proceeded to sentencing:

> There is no question but that when the Court entertained the acceptance of the defendant's pleas to four separate indictments I made it extremely clear that if the defendant was rearrested, rearrested I emphasize, not convicted, not indicted, not pursuant to a subsequent hearing, but rearrested period, that I was going to enhance his sentence and give him the maximum sentence allowed under the law.

(App. at 100.) Continuing, the Justice emphasized that although he considered any arrest sufficient to constitute breach, he would also look into "the quality of the arrest"

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[2] The evidence that Maietta offered to introduce were a signed, but unsworn, statement of a man who claimed to have committed the burglary, and the statements of three alibi witnesses.

before using it as an enhancing factor. (*Id.* at 103.) Nevertheless,

> in this case not only was the defendant arrested but he was subsequently indicted so that there is an additional filter for the quality of the arrest, and not only was he arrested and not only was he indicted, but he was arrested and indicted for things that he does professionally, burglary.

Id. The Justice then sentenced Maietta to ten to twenty years.[3]

On appeal, the New York Court of Appeals held that the use of a no-arrest agreement is constitutional. 594 N.Y.S.2d at 688. However to determine whether the defendant has breached the agreement, the sentencing court must:

> conduct an *inquiry* at which the defendant has an opportunity to show that the arrest is without foundation. The nature and extent of the inquiry - whether through a summary hearing pursuant to CPL 400.10 or some other fair means - is within the court's discretion. The inquiry must be of sufficient depth, however, so that the court can be satisfied - not of defendant's guilt of the new criminal charge but of the existence of a *legitimate basis for the arrest* on that charge.

Id. (emphasis added) (citation omitted).

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[3] Maietta later plead guilty to the Westchester burglary although he claims that he did so because he was tired of the judicial system and because the new sentence would run concurrently with the sentence imposed for the Bronx crimes.

Applying the test, the Court satisfied itself that Justice Sheindlin had conducted an appropriate inquiry: "[T]he record establishes a solid factual and legal basis for the postplea arrest for burglary . . . It can hardly be said that there was not enough in the record on which to predicate a breach of the condition." *Id.* at 688-89.

2.

Before a federal court may grant a writ of habeas corpus, it must first determine whether the relief sought is based on the application of a "new" rule of criminal procedure, that is one that is announced after the defendant's conviction become final. *Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994). If so, the writ is not to be granted unless the new rule falls within one of two narrowly drawn exceptions, discussed below. *Id.* A rule is "new" if "the result was not *dictated* by precedent existing at the time the defendant's conviction become final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (emphasis added).

3.

Because it is unclear precisely what rule the relief sought by Maietta requires, the Court must postulate a rule from the procedural history of this case. The New York Court of Appeals has already held that the government cannot prove breach of a "no-arrest" agreement by simply producing proof of the arrest. It held that the sentencing court must conduct an inquiry at which the sentencing court must satisfy itself that there exists a legitimate basis for the arrest. To grant Maietta his relief, this Court would have to go further and, at a minimum, hold that the sentencing court must hold a hearing, rather than a mere inquiry, to determine whether there existed a foundation or legitimate basis for the arrest.

4.

At the time that Maietta's conviction became final,[4] and indeed as of this date, no jurisdiction, federal or state, required, in the event of an alleged breach of a no-arrest agreement, a hearing to determine whether there was a legitimate basis for the arrest. Furthermore, reasonable jurists surveying the state and federal legal landscape could disagree whether such a development was prudent or necessary. *See Caspari*, 114 S. Ct. at 950. While there is strong, but not universal, support for the need for hearings to resolve factual questions regarding breach of plea agreements, *see United States v. Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986); *United States v. Swinehart*, 614 F.2d 853, 858-59 (3d Cir. 1980); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981), whether a defendant has been arrested is only a factual question if the court holds that it is necessary to look beyond the fact of the arrest and determine the "quality" of the arrest.

5.

Having determined that the petitioner seeks the announcement and application of a new rule, the Court must determine whether the rule would fall within one of the two exceptions. The first exception is for "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" 489 U.S. at 307 (*quoting Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J. dissenting)), clearly not the case here. The second exception is for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding," *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (*quoting Teague*, 489 U.S.

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[4] "A state conviction and sentence becomes final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari*, 114 S.Ct. at 953.

at 311). The illustrative example, cited often, is the rule requiring the right to counsel in all criminal trials for serious offenses. *See, e.g., Saffle*, 494 U.S. at 495. A review of *Teague* and its progeny, as well as Justice Harlan's dissents upon which *Teague* would later be based[5], reveals that a rule requiring a hearing to determine breach of a no-arrest agreement simply does not constitute the type of significant development in the law of criminal procedure for which the writ of habeas corpus was designed.

In *Teague* the Supreme Court even suggested that a rule of sentencing procedure may never be significant enough to fall within the second exception. The Court wrote that "[b]ecause . . . such procedures would be so central to an accurate determination of *innocence or guilt*, . . . it [is] unlikely that that many such components of basic due process have yet to emerge." 489 U.S. at 288 (emphasis added). Sentencing, by definition, never involves the determination of a defendant's innocence or guilt, only the scope of his punishment. Nevertheless, the Court has, on three occasions, applied *Teague* to new rules of sentencing procedure, each time holding that they did not fall within the second exception. *Graham v. Collins*, 113 S. Ct. 892, 903 (1993) (concerning a rule requiring special jury instructions regarding consideration of mitigating evidence during the sentencing phase of a capital punishment trial); *Sawyer v. Smith*, 497 U.S. 227, 230-31 (1990) (concerning a rule forbidding the prosecutor from, during his closing, downplaying the role of the jury in the decision to use capital punishment); *Staffle v. Parks*, 494 U.S. 484 (1990) (concerning a rule prohibiting a jury instruction that would prohibit the jury from considering sympathy for the defendant). None of these decisions suggest to the Court a different result in this action.

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[5] *See Desist v. United States*, 394 U.S. 244 (1969); *Williams v. United States*, 401 U.S. 675 (1971).

Whether a hearing is a more appropriate forum to determine whether there existed a sufficient foundation for an arrest is beyond the power of this Court to decide. New York has decided that a mere inquiry is enough and because reversal would require the announcement and application of a new rule, this Court must deny Maietta's petition.

The writ is denied, and the petition is dismissed.

Dated: New York, New York
August 22, 1995

SO ORDERED

/s/Lawrence M. McKenna
LAWRENCE M. McKENNA
U.S.D.J.

[JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL MAIETTA, 94 CIVIL 1592 (LMM)

Petitioner, JUDGMENT

-against-

FRANK IRVIN, Warden,
Wende Correctional Facility,

Respondent.

U.S. DISTRICT COURT
FILED
AUG 30 1995
S. D. OF N. Y.

Petition for a Writ of Habeas Corpus pursuant to T. 28 U.S.C. 2254, having been submitted to the Honorable LAWRENCE M. McKENNA, U.S.D.J., and the Court thereafter on August 22, 1995, having handed down its memorandum and order; denying Maietta's petition for a writ of habeas corpus, it is,

ORDERED, ADJUDGED AND DECREED; That the petition for a writ of habeas corpus be and it is hereby denied for the reasons stated in the Court's Memorandum and Order, dated August 22, 1995, and the petition is dismissed.

Dated: New York, New York
August 30, 1995

/s/James M. Parkinson
Clerk
By:/s/James F. Cloidt
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 9/5/95.

[ORDER GRANTING MOTION FOR CERTIFICATE OF PROBABLE CAUSE]

PROSKAUER ROSE GOETZ & MENDELSOHN LLP
Steven C. Krane (SK-8844)
1585 Broadway
New York, New York 10036
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL MAIETTA,

Petitioner-Appellant,

-against-

CHRISTOPHER ARTUZ,
Superintendent, Green Haven
Correctional Facility,
Stormville, New York,

Respondent-Appellee.

94 Civ. 1952 (LMM)

NOTICE OF MOTION
FOR CERTIFICATE
OF PROBABLE CAUSE

MEMO ENDORSED

PLEASE TAKE NOTICE that, upon the annexed declaration of Steven C. Krane, signed on September 28, 1995, the exhibits thereto, the accompanying memorandum of law, the Notice of Appeal filed simultaneously herewith, and all prior proceedings herein, petitioner, Michael Maietta, will move this Court, before the Honorable Lawrence M. McKenna, in Courtroom 15-D at the United States Courthouse, 500 Pearl Street, New York, New York 10007, on the 20th day of October, 1995, at 2:00 PM or as soon thereafter as counsel can be heard, for an order pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. Rule 22(b) granting petitioner a certificate of probable cause to appeal to the United States Court of Appeals for the Second Circuit from the Judgment filed August 30, 1995

in the proceeding, denying petitioner's application for a writ of habeas corpus. Petitioner believes that he is entitled to redress on appeal, and petitioner further believes that a certificate of probable cause should issue in this case. The grounds for issuance of the certificate are set forth in the accompanying memorandum of law.

Dated: New York, New York
September 28, 1995

PROSKAUER ROSE GOETZ & MENDELSOHN LLP
Attorneys for Petitioner

By: /s/Steven C. Krane
Steven C. Krane (SK-8844)

1585 Broadway
New York, New York 10036
(212) 969-3435

To:

DISTRICT ATTORNEY, BRONX COUNTY
Attorney for Respondent
215 East 161st Street
Bronx, New York 10451
Attn: Andrew Shipe, Esq.

[Handwritten Notation:] Certificate of probable cause granted. The appeal presents a question of substance, debatable among jurists of reason and that a court could resolve in a different manner, relating to the sentencing procedure followed. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). So ordered.
Lawrence M. McKenna, USDJ 10/17/95

[DECISION OF NEW YORK COURT OF APPEALS]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIE OUTLEY, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MICHAEL MAIETTA, Also Known as MICHAEL MALETTA, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSE OGTONG, Appellant.

Argued and submitted January 8, 1993; decided February 16, 1993

SUMMARY

APPEAL, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Term of the Supreme Court in the Second Judicial Department, entered November 15, 1991, which affirmed a judgment of the Criminal Court of the City of New York, Queens County (Allen Beldock, J.), convicting defendant, upon his plea of guilty, of endangering the welfare of a child.

APPEAL, in the second above-entitled action, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that Court, entered December 24, 1991, which affirmed a judgment of the Supreme Court (Gerald Sheindlin, J.), rendered in Bronx County, convicting defendant upon his plea of guilty, of criminal possession of stolen property in the third degree, burglary in the third degree, and two counts of attempted burglary in the third degree.

APPEAL, in the third above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 6, 1992, which affirmed a judgment of the Supreme Court (Robert J. Hanophy, J.), rendered in Queens County, convicting defendant,

upon his plea of guilty, of criminal possession of a weapon in the third degree.

People v Maietta, 173 AD2d 17, affirmed.
People v Ogtong, 185 AD2d 253, affirmed.

POINTS OF COUNSEL

Lee D. Greenstein, Albany, for appellant in the first above-entitled action. I. Due process entitles appellant, who was arrested between the dates of his guilty plea and sentencing, allegedly in violation of a conditional plea, to an evidentiary hearing with respect to the underlying circumstances of the arrest, prior to receiving an enhanced sentence, because he pleaded his innocence to the new charges. (*Townsend v Burke*, 334 US 736; *People v Perry*, 36 NY2d 114; *United States v Lee*, 818 F2d 1052; *People v Villanueva*, 144 AD2d 285; *People v Banks*, 161 AD2d 957; *Innes v Dalsheim*, 680 F Supp 517; *Matter of Holtzman v Beatty*, 97 AD2d 79; *Matter of Department of Envtl. Protection v Department of Envtl. Conservation*, 70 NY2d 233.) II. The imposition of a one-year sentence was excessive when appellant had been promised probation but was sentenced to one year in jail solely because of a misdemeanor arrest prior to sentencing, where appellant has a limited criminal record and had a plausible explanation for the rearrest charging him with a violation of an order of protection. III. The court abused its discretion in refusing to afford appellant a hearing pursuant to CPL 440.10 to determine the validity of the allegations underlying the postplea arrest, when that arrest was the sole basis for an enhanced sentence. (*People v Redman*, 148 AD2d 966.)

Richard A. Brown, District Attorney of Queens County, Kew Gardens (*Robin A. Forshaw, Barbara D. Underwood and Daniel J. O'Reilly* of counsel), for respondent in the first above-entitled action. I. When the sentencing court sought to rely on a postplea arrest as a basis, under the plea agreement, for voiding its promise of probation and instead imposing a sentence of imprisonment, the court afforded defendant due process by providing him with a meaningful opportunity to

contest the charge underlying the arrest. (*Gardner v Florida*, 430 US 349; *Townsend v Burke*, 334 US 736; *People v Murello*, 39 NY2d 879; *People v Cataldo*, 39 NY2d 578; *People v Selikoff*, 35 NY2d 227; *Innes v Dalsheim*, 864 F2d 974; *Williams v New York*, 337 US 241; *People v Felix*, 58 NY2d 156; *United States v Lee*, 818 F2d 1052.) II. Defendant has failed to preserve any claim of a right to a hearing pursuant to CPL 400.10. In any event, no such hearing was required. (*United States v Lee*, 818 F2d 1052; *United States v Pugliese*, 805 F2d 1117; *People v Taylor*, 65 NY2d 1.) III. The sentence imposed was not excessive. (*People v Miles*, 61 NY2d 635; *People v Suitte*, 90 AD2d 80; *People v Kazepis*, 101 AD2d 816.)

Thomas M. O'Brien, New York City, for The Legal Aid Society, *amicus curiae*, in the first above-entitled action. The trial court denied appellant due process of law by imposing a one-year jail sentence instead of the promised probation solely because appellant was arrested on another charge, without requiring some proof of that charge or giving appellant an opportunity to rebut the charge. (*Schware v Board of Bar Examiners*, 353 US 232; *United States v Lee*, 818 F2.d 1052; *United States v Pugliese*, 805 F2d 1117; *Townsend v Burke*, 334 US 736; *United States v Tucker*, 404 US 443; *Specht v Patterson*, 386 US 605; *Collins v Buchkoe*, 493 F2d 343; *Elswick v Holland*, 623 F Supp 498, *appeal dismissed sub nom. Matter of Elswick*, 782 F2d 1034; *United States v Powell*, 487 F2d 325.)

Proskauer Rose Goetz & Mendelsohn, New York City (*Steven C. Krane* and *Bruce G. Hart, Jr.*, of counsel), for appellant in the second above-entitled action. The court improperly enhanced Maietta's sentence based solely upon the fact of a postplea arrest, the validity of which was challenged at sentencing. (*People v Banks*, 161 AD2d 957; *People v Harrison*, 161 AD2d 550; *People v Caridi*, 148 AD2d 625, 74 NY2d 662; *People v Faulkner*, 182 AD2d 1025; *Townsend v Burke*, 334 US 736; *People v Perry*, 36 NY2d 114; *United States v Lee*, 818 F2d 1052; *People v Villanueva*, 144 AD2d 285; *Innes v Dalsheim*, 680 F Supp 517, 864 F2d 974; *People v Curtis*, 116 Misc 2d 637.)

Robert T Johnson, District Attorney of Bronx County, Bronx (*Daniel & Ratner and Peter D. Coddington* of counsel), for respondent in the second above-entitled action. The court sentenced appellant in accordance with its sentence promise. (*People v Carcel*, 3 NY2d 327; *People v Schultz*, 73 NY2d 757; *People v Danny G.*, 61 NY2d 169; *People v McConnell*, 49 NY2d 340; *Matter of Benjamin S. v Kuriansky*, 55 NY2d 116, 56 NY2d 570, 807, *sustained sub nom. Siegel v State of New York*, 691 F.2d 620, 459 US 1209, 460 US 1104; *People v Frederick*, 45 NY2d 520; *People v Selikoff*, 35 NY2d 227; *People v Farrar*, 52 NY2d 302.)

Richard Sweren, New York City, for appellant in the third above-entitled action. I. Due process entitled appellant to an evidentiary hearing to refute the sole aggravating factor used by the trial court to enhance his sentence. (*Townsend v Burke*, 334 US 736; *United States v Lee*, 818 F2d 1052, 484 US 956; *United States v Pugliese*, 805 F2d 1117; *Innes v Dalsheim*, 680 F Supp 517, 864 F2d 974, 493 US 809; *People v Kihm*, 143 AD2d 199; *People v Banks*, 161 AD2d 957; *People v Faulkner*, 182 AD2d 1025, *People v Maietta*, 173 AD2d 17; *People v Villanueva*, 144 AD2d 285; *People v Schultz*, 73 NY2d 757.) II. It was an abuse of discretion for the court to arbitrarily reject appellant's credible exculpatory explanation for his rearrest without adequate fact finding. (*People v Villanueva*, 144 AD2d 285; *Innes v Dalsheim*, 680 F Supp 517; *People v Banks*, 161 AD2d 957; *People v Maietia*, 173 AD2d 17; *People v Farrar*, 52 NY2d 302; *People v Blagrove*, 146 AD2d 490; *People v Hernandez*, 86 AD2d 618.) III. Appellant's ambivalent plea of guilty was coerced by the court and therefore was not knowingly, intelligently, or voluntarily entered. (*Matter of Randall v Rothwax*, 161 AD2d 70, 78 NY2d 494; *People v Jones*, 63 AD2d 1008; *People v Griffith*, 80 AD2d 590; *People v Hollis*, 74 AD2d 585, 49 NY2d 1004; *People v Hernandez-Flores*, 172 AD2d 159; *People v Fowler*, 167 AD2d 154; *People v Serrano*, 15 NY2d 304: *People v Moore*, 71 NY2d 1002.)

Richard A. Brown, District Attorney of Queens County, Kew Gardens (*Robin A. Forshaw, Barbara D. Underwood* and *Daniel J. O'Reilly* of counsel), for respondent in the third above-entitled action. I. The courts below correctly rejected defen-

dant's challenge to the sentence of imprisonment imposed after defendant was rearrested on a new charge, in violation of the condition imposed by the court for its promise of a sentence of probation under the plea agreement. (*People v Seaberg*, 74 NY2d 1; *People v Moissett*, 76 NY2d 909; *Gardner v Florida*, 430 US 349; *Townsend v Burke*, 334 US 736; *People v Murello*, 39 NY2d 879; *People v Cataldo*, 39 NY2d 578; *People v Selikoff*, 35 NY2d 227; *Innes v Dalsheim*, 864 F2d 974.) II. Defendant's plea of guilty and his waiver of the right to appeal were entered knowingly, intelligently and voluntarily. (*People v Harris*, 61 NY2d 9; *Matter of Randall v Rothwax*, 161 AD2d 70, 78 NY2d 494; *People v Lopez*, 71 NY2d 662; *People v Seaberg*, 74 NY2d 1.)

OPINION OF THE COURT

HANCOCK, JR., J.

In these cases, the courts, in accepting guilty pleas, expressly conditioned the agreed-upon sentences on defendants *not being arrested* while on release awaiting sentence. Defendants, although arrested on additional charges prior to their sentencing dates, specifically denied the commission of any criminal acts and claimed that there was no basis for their arrests. Despite their denials, defendants were given sentences substantially greater than stipulated in the conditional plea bargains.

Defendants' appeals present this question: when a court has made a plea bargain containing a no-arrest condition and the defendant is arrested prior to sentencing for an act which is denied, what basis for the arrest must be shown in order for the court to be relieved of its obligation to impose the bargained-for sentence? For reasons to be explained in our discussion of this question, we conclude in each case that the basis for the arrest developed on the record by the court before it imposed sentence was sufficient to establish a failure of the no-arrest condition. Accordingly, there should be an affirmance of each order.

People v Outley

On January 22, 1990, defendant pleaded guilty to endangering the welfare of a child in satisfaction of charges that he had sexually abused his 13-year-old daughter. At the time of the plea, the court agreed to sentence defendant to a period of probation not to exceed three years provided that defendant "not be arrested on any other charges during [the] adjournment period." The court stated to defendant: "If you violate any of these conditions, I will not be bound by my promise, and I will be free to sentence you to whatever the case allows, in this case, up to one year in prison. Do you understand that?" Defendant replied, "Yes". The court scheduled sentencing for March 8, 1990 and released defendant on his own recognizance until that date.

When defendant appeared for sentencing on March 8, it was revealed that he had been arrested on February 26, on a charge of criminal contempt (Penal Law § 215.50 [3]) for violating two court orders -- an order of Queens County Criminal Court and Queens County Family Court -- both directing him to stay away from his wife and daughter and their residence. Defendant's counsel advised the sentencing court that although her client had visited his former home while his wife and daughter were present he "didn't have the requisite criminal intent to defy [the orders]" to constitute a criminal contempt.

Defendant explained that he had stopped at his former home to pick up some papers he needed for a forthcoming Federal court legal proceeding. Before going there, he said, he talked with his wife who told him he could "come back and get the papers"; his violation of the orders "was not done with malice", he claimed, and "there was no bad intent whatsoever". Defense counsel argued that a hearing was necessary to determine whether it could be shown "by a preponderance of evidence that the defendant" had, in fact, "committ[ed] the crimes that are the gravamen of the new arrest" and that without "an evidentiary hearing" the court lacked power to

impose the enhanced sentence. The court replied that what defense counsel was doing "right [then]" was "giving [defendant's] side at a hearing as to why he was there". Moreover, the court noted, defendant's wife or the person concerned had called the police and his wife had signed a sworn affidavit attesting to the allegations in the criminal contempt complaint, "indicating she want[ed] [the] Order of Protection enforced." After reviewing the unfavorable probation report, the court sentenced defendant to one year in the New City Reception and Rehabilitation Center.

The Appellate Term affirmed, concluding that "[s]ince defendant was permitted to explain to the court the allegedly exculpatory details of his breach of the order of protection, the requirements of due process were satisfied" and that the enhanced sentence was a proper exercise of discretion considering the fact that defendant's wife was the complainant. A Judge of this Court granted leave to appeal.

People v Maietta

On March 11, 1991, defendant pleaded guilty in satisfaction of several charges of burglary and related crimes in four separate indictments to criminal possession of stolen property in the third degree, two discrete charges of attempted burglary in the third degree, and burglary in the third degree. In accepting defendant's guilty pleas, the court agreed that it would make the sentences concurrent so that the aggregate term of imprisonment for defendant would be a maximum of eight years and a minimum of four years. The plea arrangement was expressly conditioned, however, upon the defendant's "not be[ing] rearrested between [the date of the plea] and the date of sentence". The record contains the following colloquy:

> "THE COURT: You are a professional burglar, sir, so if you don't get out of your profession and you get arrested again, instead of it being four to eight, I will

give you a total time in jail which will come to 22 years in jail, do you understand that?

"DEFENDANT MAIETTA: Yes.

"THE COURT: You will not be permitted to withdraw your pleas of guilty, you will not be permitted to go to trial, you will just get an enhanced sentence of 22 years in State's prison, do you understand?

"DEFENDANT MAIETTA: Yes, sir.

"THE COURT: Do you want to ask me any questions?

"DEFENDANT MAIETTA: No, sir.

"THE COURT: Of course if you appear and don't get arrested I will give you four to eight.

"DEFENDANT MAIETTA: Yes."

On May 2, 1991 when defendant appeared for sentencing, the prosecuting attorney advised that defendant had been arrested on an indictment charging him with the commission of a burglary and related crimes in Westchester County on March 28, 1991. Defense counsel, in an extended statement, explained that the Westchester indictment was for a burglary in Yonkers in which the perpetrators employed a jeep registered to his client but not driven by him. Defendant had nothing to do with it, he said, and he had three alibi witnesses who would testify that his client was working at the time of the crime.

Defense counsel produced an unsigned statement from one Anthony Salveggi to the effect that he had been driving defendant's jeep, that defendant was not present, and that the person who had committed the burglary was Alfredo Occhino, his passenger in the jeep. It appears, however, that Anthony Salveggi was known as a professional burglar who had partici-

pated with defendant in past crimes and that Alfredo Occhino had been charged as a codefendant in one of the burglary indictments to which defendant had pleaded guilty.

At the end of the discussion, the court, adverting to the no-arrest condition, stated:

> "it was a condition that may result in an increased sentence I wanted everyone to fully understand. I wasn't going to ambush anyone on the date of sentence."

and further:

> "an arrest is still an arrest, and I look at it, at an arrest and sometimes I use it and sometimes I don't, it depends on my review of the quality of the arrest and some of the circumstances surrounding it before I actually use it as an enhancing factor despite the strong language that I use at the time that I accept the plea and condition it on another arrest.
>
> "However, in this case not only was the defendant arrested but he was subsequently indicted so that there is an additional filter for the quality of the arrest, and not only was he arrested and not only was he indicted, but he was arrested and indicted for things that he does professionally, burglary."
>
> The court denied defendant's application to withdraw the four guilty pleas and then pronounced consecutive sentences for the crimes such that the minimum term was 10 years and the maximum 20.

On appeal, the Appellate Division, with two Justices dissenting in part, affirmed (*see, People v Maietta*, 173 AD2d 17). The Court expressly rejected the view of the dissenters that where a defendant denies committing the alleged postplea crime or participating in the acts which lead to the arrest, "it

is incumbent upon the sentencing court to conduct a hearing to resolve the disputed factual contentions" (*id.*, at 27). The case is before us by leave of a Justice of the Appellate Division.

People v Ogtong

By a plea of guilty on March 6, 1991, defendant was convicted of criminal possession of a weapon in the third degree. In accepting the plea, the court, as part of the plea agreement, stipulated that it would sentence defendant to five years' probation. Before adjourning the matter until the sentencing date, the court admonished defendant as follows:

> "you are getting probation here. I will allow you to remain at liberty pending your sentence under the following conditions, that * * * You do not get arrested between now and the time of sentence. You will fully cooperate with the Department of Probation and you show up on the date of the sentence.
>
> "If you violate any of the above conditions, the Court will not be bound by the promise to you and [may] sentence you to whatever sentence [it feels] is justified. Do you understand that?
>
> "THE DEFENDANT JOSE OGTONG: Yes * * *
>
> "THE COURT: You agree to the terms?
>
> "THE DEFENDANT JOSE OGTONG: Yes * * *
>
> "THE COURT: You know that you will not be allowed to take back your plea?
>
> "THE DEFENDANT JOSE OGTONG: Yes."

On May 22, the date of sentence, the prosecuting attorney advised the court that defendant had been arrested for criminal possession of a controlled substance in the seventh

degree. Defense counsel -- while acknowledging that defendant had been arrested on March 6, the same day as the guilty plea -- argued that his client had not violated the condition of the plea bargain. He explained that after pleading guilty defendant had gone directly to visit his probation officer. When he went through a metal detector a tin was discovered in his pocket which contained a small quantity of cocaine.

Counsel maintained that it was only .4 grains of cocaine, a residue amount which had simply been in defendant's pocket from a previous occasion. It was a technical violation, he argued, which did not arise from any conduct of defendant following his guilty plea and evidenced no intention on his part to violate the court's no-arrest condition. In reply, the Assistant District Attorney produced a copy of a lab report which showed that defendant had been in possession of two quantities of cocaine -- .4 grains in a tinfoil packet and 11 grains contained in a paper packet.

The court denied defense counsel's request for an evidentiary hearing on the circumstances of the March 6 arrest and sentenced defendant to prison for a minimum of 1 1/4 years and a maximum of 3 3/4 plus a mandatory surcharge of $152. The Appellate Division affirmed unanimously in a memorandum stating, "before it imposed the enhanced sentence, the court afforded the defendant the opportunity to explain his arrest. After finding the explanation insufficient the court properly imposed the more severe sentence" (*People v Ogtong*, 185 AD2d 253). The appeal is here by leave of a Judge of this Court.

Discussion

Our discussion starts with a reiteration of the settled rules that sentencing is a critical stage of the criminal proceeding and that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause" (*Gardner v Florida*, 430 US 349, 358). To comply with due process, it has been held, the sentencing court must assure

itself that the information upon which it bases the sentence is reliable and accurate (*see, Mempa v Rhay*, 389 US 128, 133; *Townsend v Burke*, 334 US 736, 741; *United States v Lee*, 818 F2d 1052, 1055 [2d Cir 1987]). The question before us concerns the minimum requirements of due process when, as in these appeals, the defendant has breached a no-arrest condition by being arrested before the sentence but denies any complicity in the underlying crime.

Defendants argue that when a defendant denies the postplea criminal conduct, the court must conduct an evidentiary hearing to satisfy itself by a preponderance of the evidence that the defendant has, in fact, committed the crime for which he was arrested. Nothing in the decisions of our State courts or of the Federal courts calls for such an onerous rule and we decline to adopt it. Imposing such a requirement would have the effect of changing the condition of the plea bargain from *not being arrested for a crime to not actually committing a crime*. Defendants do not attack the legality of attaching a no-arrest condition to a plea bargain and, indeed, the procedure has been approved in this State and in courts of other jurisdictions (*see, People v Murello*, 39 NY2d 879; *People v Faulkner*, 182 AD2d 1025, *lv dismissed* 80 NY2d 830; *People v Banks*, 161 AD2d 957, 957-958; *People v Harrison*, 161 AD2d 550; *People v Kihm*, 143 AD2d 199; *Innes v Dalsheim*, 680 F Supp 517 [ED NY 1988), *revd on other grounds* 864 F2d 974). We agree with the Appellate Division in *Maietta*, that the proposed evidentiary hearing rule, if adopted, would have the undesirable consequence of requiring, in effect, "a minitrial" of the defendant's guilt or innocence on the new charge (*see, Maietia, supra*, at 24).

If, as we hold, proof that defendant actually committed the postplea offense which led to the arrest is not necessary, what lesser showing does due process require in order for the court to impose the enhanced sentence? Obviously, the mere fact of the arrest, without more, is not enough. A no-arrest condition could certainly not be held to have been breached by arrests which are malicious or merely baseless (*see, Innes, supra,*

at 519). When an issue is raised concerning the validity of the postplea charge or there is a denial of any involvement in the underlying crime, the court must conduct an inquiry at which the defendant has an opportunity to show that the arrest is without foundation (*see, Banks, supra,* at 958 [sentencing court should not have summarily dismissed defendant's plausible, exculpatory explanation of postplea arrest]). The nature and extent of the inquiry -- whether through a summary hearing pursuant to CPL 400.10 or some other fair means -- is within the court's discretion (*id.*). The inquiry must be of sufficient depth, however, so that the court can be satisfied -- not of defendant's guilt of the new criminal charge but of the existence of a legitimate basis for the arrest on that charge.

In each case before us, the inquiry conducted was sufficient so that the sentencing court could be satisfied that there was a legitimate basis for the arrest. In *Outley*, defendant had concededly violated the orders of two different courts commanding that he stay away from his wife and child. Defendant and his counsel were permitted to explain the circumstances of the visit to his home in an effort to demonstrate that defendant had no intent to defy the courts' authority. We cannot say, however, that the sentencing court and the Appellate Term erred in holding, from the fact that defendant's wife had signed the complaining affidavit, that there was a legitimate foundation for the contempt charge.

Similarly, in *Maietta*, the record establishes a solid factual and legal basis for the postplea arrest for burglary. As noted by the sentencing court and the Appellate Division, the fact that a Westchester County Grand Jury had found a prima facie case for the charge by returning an indictment against defendant constituted an " 'additional filter for the quality of the arrest' " (*Maietta, supra,* at 21). The jeep involved in the burglary was concededly owned by the defendant and a policeman identified him as the driver of the vehicle when it left the scene. Given this evidence and the plainly suspect nature of the statement given by defendant's witness, Salveggi,

it can hardly be said that there was not enough in the record on which to predicate a breach of the condition.

We also find the record sufficient to establish a breach of the no-arrest condition in *Ogtong*. As in *Outley*, defendant's argument was not that he had not committed the act for which he was arrested (possession of some amount of cocaine) but that his possession was unknowing and did not evince an intent to violate the court's condition. The sentencing court afforded defendant an adequate opportunity to explain the circumstances of the arrest. We cannot conclude that the courts below erred in finding the explanation insufficient (*see, Ogtong, supra,* at 712).

In sum, in each of these cases, the defendant's agreement to the no-arrest term as a condition of the plea bargain and the postplea release from custody was unequivocal and the sentencing court did not abuse its discretion in imposing the enhanced sentence. Accordingly, the order in each appeal should be affirmed.

Acting Chief Judge SIMONS and Judges TITONE, BELLACOSA AND WEISS* concur; Judges KAYE and SMITH taking no part.

In each case: Order affirmed.

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* Designated pursuant to NY Constitution, article VI, § 2.

[DECISION OF APPELLATE DIVISION, FIRST DEPARTMENT]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MICHAEL MAIETTA, Also Known as MICHAEL MALETTA, Appellant.

First Department, December 24, 1991

SUMMARY

APPEAL from a judgment of the Supreme Court (Gerald Sheindlin, J.), rendered May 2, 1991 in Bronx County, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the third degree, burglary in the third degree, and two counts of attempted burglary in the third degree, and sentencing defendant to consecutive terms of imprisonment of from 3½ to 7, 3½ to 7, 1½ to 3, and 1½ to 3 years, respectively.

APPEARANCES OF COUNSEL

David H. Fromm of Counsel (*Polatsek & Fromm* attorneys), for appellant.

Daniel S. Ratner of counsel (*Billie Manning* with him on the brief; *Robert T. Johnson, District Attorney*, attorney), for respondent.

OPINION OF THE COURT

ROSS, J.

The appeal before us presents the issue of whether Criminal Term can enhance a sentence, when a defendant breaches a specific condition of a plea negotiation, by his rearrest.

Between September 1990 and January 1991, Bronx County Grand Juries filed four separate indictments against defendant, and others, charging them with the commission of

the felony crimes of burglary in the second degree (Penal Law § 140.25 [four counts], burglary in the third degree (Penal Law § 140.20 [three counts]), possession of burglar's tools (Penal Law § 140.35 [two counts], criminal possession of stolen property in the third degree (Penal Law § 165.50), criminal possession of stolen property in the fourth degree (Penal Law 165.45 [three counts]), criminal mischief in the second degree (Penal Law § 145.10), criminal mischief in the third degree (Penal Law § 145.05 [three counts]), grand larceny in the fourth degree (Penal Law § 155.30), attempted grand larceny in the third degree (Penal Law §§ 110.00, 155.35), and related misdemeanor crimes.

The People allege that those four indictments deal with the activities of a burglary ring, in which the defendant "was allegedly the so-called ring master. [This] group of burglars included childhood friends and family members * * * This was allegedly not a rinky-dink organization. These burglaries were planned in advance * * * The burglars were equipped with police scanners so as to monitor police frequencies before the burglaries were committed. The police would receive calls on the 911 phone misdirecting them to go to other locations".

Subsequent to arraignment and after consultation with counsel, defendant knowingly and voluntarily pleaded guilty to a single felony count under each one of the four indictments, in full satisfaction of those indictments.

The details of defendant's four pleas, in substance are:

First, defendant pleaded guilty to the crime of criminal possession of stolen property in the third degree, a class D felony, under indictment number 6251/90, and admitted that, on or about June 26, 1990, at about 10:00 P.M., inside a private house, located at 2407 Esplanade Avenue, Bronx County, he possessed motorcycle helmets, stereo and phone equipment, and jewelry, all of which he knew had been stolen, and which he had not been given permission or authority to possess.

Second, defendant pleaded guilty to the crime of attempted burglary in the third degree, a class E felony, under indictment number 6820/90, and admitted that, on or about August 24, 1990, at about 2:00 A.M., he entered a cigarette warehouse, located at St. Ann's Avenue, Bronx County, and stole property located in said warehouse.

Third, defendant pleaded guilty to the crime of attempted burglary in the third degree, a class E felony, under indictment number 9570/90, and admitted that, on or about November 15, 1990, at about 3:20 P.M., he entered a building, located at 727 Throgs Neck Expressway, Bronx County, and stole certain property in that building.

Fourth, defendant pleaded guilty to the crime of burglary in the third degree, a class D felony, under indictment number 10082/90, and admitted that, on or about November 12, 1990, at about 3:00 A.M., together with Mr. Alfio Occhino, he entered premises, located at 1611 East 233rd Street, Bronx County, and he stole cash, a deli scale and cigarettes.

In exchange for defendant's four felony pleas of guilty, Criminal Term agreed to impose a sentence of 4 to 8 years, and to permit defendant to remain on bail until sentence was imposed, upon the conditions that defendant not be arrested again, between the time of the plea and the date of sentence, he cooperate with the Probation Department, and he appear for sentence.

The following colloquy took place between Criminal Term and the defendant concerning the fact that if defendant was arrested again before the date of sentence, the sentence would be enhanced:

"THE COURT: You are a professional burglar, sir, so if you don't get out of your profession and you get arrested again, instead of * * * being four to eight, I will give you a total time in jail which will come to 22 years in jail, do you understand that?

"DEFENDANT * * * Yes.

"THE COURT: You will not be permitted to withdraw your * * * pleas of guilty, you will not be permitted to go to trial, you will just get an enhanced sentence of 22 years in State's prison, do you understand?

"DEFENDANT * * * Yes, sir.

"THE COURT: Do you want to ask me any questions?

"DEFENDANT * * * No, sir.

THE COURT: Of course if you appear and don't get arrested I will give you four to eight.

"DEFENDANT * * * Yes."

After accepting the pleas, Criminal Term adjudicated defendant, without objection, a predicate felony offender, upon the basis of a judgment, Supreme Court, Queens County, entered December 3, 1985, which convicted him of the crime of grand larceny in the second degree, and for which he was sentenced to an indeterminate prison term of 2 to 4 years.

Before adjourning the plea proceeding, and continuing defendant on bail, until the date of sentence, Criminal Term once more warned defendant: "you get arrested again, not convicted but arrested again, you face significant time in jail". When the court asked him if that warning was clear, defendant unequivocally answered: "Yes".

Thereafter, on May 2, 1991, when the defendant appeared for sentencing, the People requested Criminal Term to impose the enhanced sentence, since defendant had breached the no-arrest condition of the plea negotiation, by being arrested as well as indicted for a burglary committed in Yonkers, on or about March 28, 1991, which date was approximately 17 days after he had entered his pleas of guilty to the

four indictments. The People submitted to Criminal Term a copy of the Westchester County indictment, charging that defendant, acting in concert with another unnamed person, committed the crimes of burglary in the second degree (Penal Law § 140.25), criminal trespass in the second degree (Penal Law § 140.15), and criminal mischief in the fourth degree (Penal Law § 145.00).

It is undisputed that, in the Westchester County burglary case, *inter alia*, a person, who emerged from a Jeep owned by defendant, allegedly attempted to kick in the door of a residence, and thereafter that person fled, with no one being arrested at the scene. Further, it is also undisputed that the police traced the ownership of the Jeep back to defendant, and that a Yonkers police officers who observed the fleeing Jeep, subsequently identified defendant, from a photograph, as its driver.

Defense counsel contended that since defendant claimed that he was innocent of the crimes committed in Westchester County, the sentence should not be enhanced. In support of that position, defense counsel offered a handwritten unsworn statement of Mr. Anthony Salveggi, who alleged that he drove the Jeep in the Westchester incident, and that his passenger was Mr. Occhino, who he accused of committing the crime in issue.

We note in passing that, as discussed *supra*, in defendants plea of guilty to the crime of burglary in the third degree, in satisfaction of Bronx indictment number 10082/90, he admitted that he committed that crime with the said Mr. Occhino.

After hearing defense counsel's argument, Criminal Term rejected same, and held that, in accordance with the terms of the plea negotiation, it was going to enhance the sentence, based upon defendant's new arrest. In pertinent part, Criminal Term explained: "in this case not only was the defendant arrested but he was subsequently indicted so that

there is an additional filter *[sic]* for the quality of the arrest, and * * * he was arrested and indicted for things that he does professionally, burglary * * * The condition of the promise was fully and completely and clearly discussed * * * [Defendant's] plea was intelligently and knowingly and freely and voluntarily entered at that time with the conditions".

Subsequently, upon the basis of defendant's previously entered pleas of guilty, Criminal Term sentenced him, as a second felony offender, to two indeterminate terms of imprisonment of from 3½ to 7 years for the crimes of criminal possession of stolen property in the third degree and burglary in the third degree, and to two indeterminate terms of imprisonment of from 1½ to 3 years for the crime of attempted burglary in the third degree (two counts). Since Criminal Term directed that the four sentences run consecutively, the minimum term is 10 years and the maximum is 20 years. Defendant appeals.

Defendant contends, in substance, that Criminal Term erred in imposing an enhanced sentence, since he denied any involvement in the Westchester crimes.

Pursuant to CPL § 220.10 (4)(b), a defendant, such as the instant defendant, who is faced with a number of indictments, containing a number of felony counts, "may, with both the permission of the court and the consent of the people, enter a Plea of * * * [g]uilty of a lesser included offense". The "guilty plea telescopes the judicial process and the necessarily protracted intervals involved in charge, trial, and sentence, and even appeals, hopefully starting the offender on the road to possible rehabilitation" (*People v Selikoff*, 35 NY2d 227, 233 [1974], *cert. denied* 419 US 1122 [1975]). We have held that "[t]he general rule is that a plea of guilty is a waiver of all nonjurisdictional defects. (*People v Vina*, 47 AD2d 895.)" (*People v Giuliano*, 52 AD2d 240, 243 [1st Dept 1976].) Further, "[a] guilty plea generally represents a compromise or bargain struck after negotiation between defendant and the People. As

such, it marks the end of a criminal case, not a gateway to further litigation (*People v Taylor*, 65 NY2d 1, 5 [1985]).

The Court of Appeals, in *People v Cataldo* (39 NY2d 578, 580 [1976]), held "[c]ompliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation thereof. A contrary holding would permit any defendant to withdraw his plea of guilty solely because he was disappointed with the sentence received, even though the court has kept its word in that respect".

Our review of the record indicates that at no time during the plea negotiation did either the defendant or his counsel raise any objection, on either factual or legal grounds, to the condition that, if defendant was re-arrested, the sentence would be enhanced. In fact, the only question raised about the re-arrest condition was defense counsel's query to Criminal Term as to what would happen if defense counsel was able to obtain a dismissal of the arrest within three days, and Criminal Term unequivocally replied: "[t]he promise that I'm making to you, three days after his arrest, if the case is dismissed, I will consider that case an erroneous arrest".

Repeatedly, we have held that Criminal Term can enhance a sentence, when a defendant violates explicit conditions of a plea negotiation, such as that he or she appear at sentence, maintain good conduct until the date of sentence, not commit any further crimes, and not be re-arrested (*People v Salem*, 169 AD2d 594 [1st Dept 1991]; *People v. Dremeguila*, 166 AD2d 196, 197 [1st Dept 1990]; *People v Harrison*, 161 AD2d 550, 551 [1st Dept 1990]; *People v Hernandez*, 155 AD2d 361 [1st Dept 1989]). Further, the Appellate Division has upheld an enhanced sentence, when a defendant breached the explicit plea condition of cooperation with the Department of Probation (*People v Moore*, 155 AD2d 696 [1989]).

Recently, we stated in *People v Harrison (supra*, at 551), "Defendant asserts that his due process rights were violated

because the court gave improper consideration to extraneous crimes in imposing his sentence. We find this claim to be without merit. A sentencing court may properly consider a defendant's subsequent arrests, especially where the court expressly conditioned its earlier sentencing promise on defendant's good conduct".

More than 40 years ago the United States Supreme Court stated: "[t]he due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts -- state and federal -- from making progressive efforts to improve the administration of criminal justice" (*Williams v New York*, 337 US 241, 251 [1949], *reh denied* 337 US 961 [1949], 338 US 841 [1949]).

It should not be overlooked that, as a result of defendant's criminal record, he is quite familiar with the operation of the criminal justice system, and, on the basis of that experience, we find that defendant fully understood Criminal Term's warning that, if he was again arrested, the sentence would be enhanced. The Appellate Division, Second Judicial Department, has held that Criminal Term properly imposed a higher sentence than the one promised at a plea proceeding, when a defendant, "who had extensive prior experience in the criminal justice system," breached a plea condition of "not becoming involved in any further 'trouble' of a criminal nature", by his "arrest and indictment for criminal offenses committed after the plea proceedings and prior to the scheduled sentencing date" (*People v Caridi*, 148 AD2d 625, 625-626 [1989], *lv denied* 74 NY2d 662 [1989]).

The dissent concedes that the provision of an enhanced sentence, if a defendant breaches a plea condition not to be re-arrested before sentencing, "is a necessary and essential deterrent to criminal conduct by defendants, convicted upon their plea of guilty, who are released pending sentence" (*see*, dissent, at 26-27). We agree, since, if trial courts could not enhance a sentence, when a defendant breached a condition

not to be re-arrested, such courts would be reluctant to ever permit defendants to remain free, during the period of time between plea and sentence.

Further, the dissent contends that there is an exception to this general rule of enforceability of the breach of the re--arrest condition in the instant case, since the defendant claims that he is innocent of the new crimes, and, in view of the fact that "the consequences of defendant's commission of a postplea crime are so substantial under the terms of the plea arrangement itself, it is incumbent upon the sentencing court to conduct a hearing to resolve the disputed factual contentions" (*see*, dissent, at 27).

In support of his contention that Criminal Term must hold a hearing, the dissent primarily relies upon three cases: *People v Villanueva* (144 AD2d 285 [1st Dept 1988]), *People v Banks* (161 AD2d 957 [1990]), and *United States v Lee* (818 F.2d 1052 [2d Cir 1987], *cert denied* 484 US 956 [1987]). After examining those cases, we find them all to be inapplicable, since none of them involves a defendant who breached a provision of a plea negotiation specifically providing that re-arrest would result in an enhanced sentence.

People v Villanueva (*supra*) involved a sentence imposed after a jury conviction, and therefore no plea promises were involved. While *People v Banks* (*supra*, at 957) involved a guilty plea, it concerned the effect on sentence enhancement of a breach of a general plea condition " 'not to get into any additional trouble between now and the time of sentence'", and not a breach of a specific condition not to be re-arrested. Finally, while *United States v Lee* (*supra*) involves a guilty plea, it concerned sentence enhancement where no conditions were imposed and was based upon the use of a presentence report, and not sentence enhancement based upon the breach of a plea condition.

Should the dissent prevail, it would create a legal morass, since the hearing to be conducted by Criminal Term

concerning what happened in Westchester would lead to a minitrial in Bronx County of a pending Westchester criminal indictment. The consequences of the result of such a minitrial, upon further legal proceedings in Westchester, would be chaotic. For example, if Bronx Criminal Term finds, after hearing the evidence presented to the Westchester Grand Jury and the defendant's defense, that the defendant was innocent of that crime, does the result of such a hearing preclude defendants further prosecution in Westchester County on double jeopardy grounds? Should the People be required to prove defendant's guilt in both Bronx and Westchester Counties, of an indictment returned in Westchester County?

On the basis of the record herein, we find that Criminal Term properly enhanced the sentence, when the defendant violated a specifically negotiated plea condition not to be rearrested, since this defendant, who was "schooled in the nature of criminal proceedings [o]nly after consultation with his attorney and detailed explanations by the court did [he] tender his guilty plea. There is, therefore, no basis for assuming that defendant was not cognizant of the legal implications and personal repercussions of his action" (*People v Frederick*, 45 NY2d 520, 525 (1978]). Moreover, the "defendant here has not been shown to have been victimized by inherent unfairness, nor is it evident that the court should have perceived any" (*People v Francis*, 38 NY2d 150, 156 [1975]).

Accordingly, judgment, Supreme Court, Bronx County (Gerald Sheindlin, J.), rendered May 2, 1991, convicting him, upon his plea of guilty, of the crimes of criminal possession of stolen property in the third degree (Penal Law § 165.50), burglary in the third degree (Penal Law § 140.20), and attempted burglary in the third degree (Penal Law §§ 110.00, 140.20 [two counts]), and sentencing him, as a second felony offender, to two indeterminate terms of imprisonment of from 3½ to 7 years for the crimes of criminal possession and burglary, and to two indeterminate terms of imprisonment of from 1½ to 3 years for the crime of attempted burglary (two counts), all sentences to run consecutively, is affirmed.

Milonas, J. (dissenting in part). In accepting defendant's plea of guilty to charges of criminal possession of stolen property, burglary and attempted burglary, on March 11, 1991, the Supreme Court repeatedly advised defendant that he would be sentenced to an aggregate term of 4 to 8 years' imprisonment if he were not arrested for any further crimes, appeared for sentencing and cooperated with probation, and that in the event he violated any of these conditions, the maximum sentence allowed by law, said to amount to an effective aggregate term of 11 to 22 years' imprisonment, would be imposed, without any opportunity for defendant to withdraw the plea in the face of the enhanced sentence. In a colloquy, the court made clear an erroneous arrest or a charge dismissed within three days would not constitute a breach of these conditions such as to lead to the imposition of the enhanced sentence.

It developed that defendant was arrested for, and indicted in connection with, a Westchester County burglary committed on March 28, 1991. At the May 2, 1991 sentencing proceeding, defendant's counsel requested, *inter alia*, a hearing as to whether defendant had committed and/or participated in the Westchester burglary. Counsel conceded, for purposes of the proceeding, that the passenger of a Jeep owned by defendant had broken in the door of a Yonkers residence on March 28, 1991 and had fled in the Jeep, driven by another, after being observed in the midst of this crime; and that defendant had been identified as the driver of the Jeep by a Yonkers police officer. It was maintained, however, that such identification was mistaken and based solely upon a 20-second viewing of the driver of the moving vehicle. Defense counsel offered the written statement of one Anthony Salveggi, asserting that he had borrowed defendant's vehicle that day, was the driver at the time of the incident, and that the door of the Yonkers residence had been broken in by his passenger, codefendant herein, Alfredo Occhino. Further, counsel represented that there were three alibi witnesses prepared to testify that defendant was working in a carpet store in the Bronx at the time of the incident. The court denied defen-

dant's applications, finding the conditions of the plea bargain leading to imposition of the enhanced sentence had been fully and carefully discussed at the plea proceeding. The court proceeded to state:

"I look at it, at an arrest and sometimes I use it and sometimes I don't, it depends on my review of the quality of the arrest and some of the circumstances surrounding it before I actually use it as an enhancing factor despite the strong language that I use at the time that I accept the plea and condition it on another arrest.

"However, in this case not only was the defendant arrested but he was subsequently indicted so that there is an additional filter for the quality of the arrest, and not only was he arrested and not only was he indicted, but he was arrested and indicted for things that he does professionally, burglary."

The court then imposed maximum consecutive terms, which in fact amounted to an effective aggregate term of 10 to 20 years' imprisonment.

The courts of this State, including this court, have repeatedly upheld the practice of imposing an enhanced sentence for breach of a plea condition that defendant "stay out of trouble" and/or not be re-arrested prior to sentencing (*People v Murello*, 47 AD2d 528, *affd* 39 NY2d 879; *People v Innes*, 111 AD2d 356; *People v Caridi*, 148 AD2d 625; *People v Hernandez*, 155 AD2d 361; *People v Harrison*, 161 AD2d 550). The provision for an enhanced sentence upon breach of such condition is a necessary and essential deterrent to criminal conduct by defendants, convicted upon their plea of guilty, who are released pending sentence. Moreover, in this case, the court's statements at both the plea and sentencing proceedings make it abundantly evident that the terms of the plea bargain did not call for an enhanced sentence merely upon an accusation against defendant. The court made it clear that "an erroneous arrest" would not constitute a breach of the condition of the plea arrangement and that only a "quality"

arrest would lead to imposition of the enhanced sentence. The court effectively communicated that the condition of the plea arrangement was that defendant not commit a postplea crime and that if defendant did so, an enhanced sentence would be imposed without the opportunity to withdraw the plea (*see, United States v Giorgi*, 840 F2d 1022, 1026). Thus, the deficiency found in the plea allocution in the *Innes* case, by the Second Circuit in Federal habeas corpus litigation, of insufficient warning that there would be no opportunity to withdraw the plea in the face of an enhanced sentence (*Innes v Dalsheim*, 864 F2d 974) is not presented here. Insofar as the enhanced sentence was imposed in the absence of a conviction (or any finding of guilt beyond a reasonable doubt) of a postplea crime, the practice is completely consistent with that of allowing consideration in sentencing of events underlying counts of an indictment which have been dismissed and even of events underlying crimes of which defendant has been acquitted (*United States v Sweig*, 454 F2d 181; *Billiteri v United States Bd. of Parole*, 541 F2d 938, 944).

While the plea arrangement was therefore enforceable, this matter differs from the above, earlier New York State cases, in that defendant herein denied committing the alleged postplea crime or even participating in the acts which led to the arrest and charge. It is well established that a defendant is entitled to an opportunity to refute routine, aggravating factors in a probation report which may negatively influence the court in sentencing (*People v Perry*, 36 NY2d 114, 119). In these circumstances, where the consequences of defendant's commission of a postplea crime are so substantial under the terms of the plea arrangement itself, it is incumbent upon the sentencing court to conduct a hearing to resolve the disputed factual contentions. Indeed, this court has itself so held. "As a matter of due process, a court may not use extraneous crimes to enhance a sentence unless it first has ascertained, by way of accurate, reliable evidence, that defendant actually committed those crimes" (*People v Villanueva*, 144 AD2d 285). The Third Department has also held a hearing is required in these circumstances. In *People v Banks* (161 AD2d 957), the

promised sentence was contingent upon defendant not getting "'into any additional trouble between now and the time of sentence'"; the sentencing court imposed a higher term without conducting a hearing upon defendants denial of criminal involvement in the theft or possession of a stolen car in which he had been arrested. The Appellate Division found that the sentencing court "'deprived defendant of his right to a meaningful opportunity to refute the single, aggravating factor which influenced the court in increasing defendants punishment". (*Supra*, at 958.) Significantly, the Federal District Court, in the course of denying James Innes' writ of habeas corpus, stated that "[a]t sentencing a defendant is, of course, entitled to require the prosecution to make some kind of showing that he did engage in acts that led to an arrest and charge" (*Innes v Dalsheim*, 680 F Supp 517, 570, *revd on other grounds* 864 F2d 974, *supra*).

There is no merit to the sentencing court's implication that the Grand Jury's indictment of defendant in connection with the Westchester burglary was sufficient protection against the possibility of imposition of an enhanced sentence based upon an erroneous arrest. The standard applicable to Grand Jury proceedings is merely that the evidence (viewed most favorably to the prosecution) be legally sufficient to establish the accused committed the offense charged and also provide reasonable cause to believe the accused committed the offense (CPL 190.65; *People v Mikuszewski*, 73 NY2d 407, 411). The proceeding is not an adversarial one and defendant is neither entitled to cross-examine witnesses nor to be represented by an attorney during the testimony of other witnesses. This is not to say that the prosecution must establish defendant's commission of a postplea crime beyond a reasonable doubt in order to enforce the plea arrangement to the extent of having the enhanced sentence imposed. The "'preponderance of the evidence" standard should be applicable to such a hearing, as is with respect to other disputed factual matters in sentencing which are legitimately the subject of an adversarial hearing (*United States v Lee*, 818 F2d 1052, *cert denied* 484 US 956). The prosecution, however, should not obtain enforcement of the

more onerous, enhanced sentence, in the face of defendant's substantiated denial, without a showing that defendant committed a postplea crime.

Accordingly, the judgment of the Supreme Court, Bronx County (Gerald Sheindlin, J.), rendered May 2, 1991, which convicted defendant, upon his guilty plea, of criminal possession of stolen property in the third degree, burglary in the third degree, and attempted burglary in the third degree (two counts), and sentenced him to consecutive terms of 3½ to 7, 3½ to 7, 1½ to 3 and 1½ to 3 years' imprisonment, respectively, should be modified, on the law, to vacate the sentence, and the matter should be remanded for resentencing proceedings not inconsistent with this decision, and the judgment should be otherwise affirmed.

SULLIVAN, J. P., and ASCH, J., concur with ROSS, J.; MILONAS and SMITH, J.J., dissent in part in an opinion by MILONAS, J.

Judgment, Supreme Court, Bronx County, rendered May 2, 1991, affirmed.

[MINUTES OF PLEA HEARING]

THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX : CRIMINAL TERM : PART 28

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THE PEOPLE OF THE STATE OF NEW YORK,

-against-	Indictment No(s)
ALFIO OCCHINO	6251/90 CPSP 3(D)
a/k/a ALFRED OCHINO	9570/90 ATT.BURG 3(D)
a/k/a/ ALFIEO OCCHINO;	10082/90 BURG 3(D)
and	
MICHAEL MAIETTA	6251/90 CPSC 3 (D)
a/k/ a MICHAEL MALETTA;	6820/90 ATT.BURG 3
	9570/90 ATT.BURG 3(D)
	10082/90 BURG 3(E)
ROBERT WALSH,	9570/90 BURG 3
Defendant(s)	PLEA MINUTES

----------x

851 Grand Concourse
Bronx, New York
March 11, 1991

Before:

HONORABLE GERALD SHEINDLIN,
Justice

Appearances:

ROBERT T. JOHNSON, ESQ.,
District Attorney, Bronx County
BY: JOSEPH MUROFF, ESQ.,
Assistant District Attorney

MICHAEL BUCHICCHIO, ESQ.,
Attorney for Defendant OCCHINO

ALBERT ANNUNZIATA, ESQ.,
Attorney For Defendant MAIETTA

LEGAL AID SOCIETY
Attorneys For Defendant WALSH
BY: DAVID BERLIN, ESQ.,

JEFFREY GORO, RPR
SENIOR COURT REPORTER

Proceedings

(The following takes place on the record in open court in the presence of the Court, A.D.A. Muroff, Mr. Buchicchio, Mr. Annunziata, Defendant Occhino and Defendant Maietta.)

THE CLERK: Numbers three, 19 and 21 on the Part 28 calendar, also number 32 and 35, Alfredo Occhino, Michael Maietta and John DeForno (Phonetic).

MR. BUCHICCHIO: Michael Buchicchio, 700 White Plains Road, Scarsdale, New York for Mr. Maietta.

MR. ANNUNZIATA: For the defendant Occhino only on dockets -- indictments 6251 of 90 and 10082 of 90, Albert Annunziata, 700 White Plains Road, Scarsdale, New York.

Good morning, Your Honor.

MR. BUCHICCHIO: Can we approach?

MR. MUROFF: For the People, Joseph Muroff.

THE CLERK: Mr. Walsh's attorney is not here yet, Judge.

THE COURT: Mr. Walsh is here though, I believe.

Mr. Walsh, step up.

(Defendant Walsh steps up to the defense table.)

(Brief pause in the proceedings.)

* * * *

THE CLERK: Recall Maietta, Occhino and Walsh, numbers three, 19, 21 and 32 and 35 on the Part 28 calendar.

MR. BERLIN: Legal Aid by David Berlin.

THE COURT: Why can't you get here on time, Mr. Berlin? Is it too early for you or too late? Get here on time.

Step up.

(Off the record discussion held at the bench.)

THE COURT: Walsh second call. Speak to your lawyer.

(Defendant Walsh and Mr. Berlin leave the courtroom.)

MR. BUCHICCHIO: Michael Buchicchio for Michael Maietta.

MR. ANNUNZIATA: Albert Annunziata for Albert Occhino.

(Brief pause in the proceedings.)

* * * *

MR. BUCHICCHIO: At this time --

THE COURT: Before you start.

(Pause in the proceedings.)

THE COURT: Recall of number three, 19 and 21, 32 and 35, Michael Maietta and Alfieo Occhino.

MR. BUCHICCHIO: Your Honor, at this time, on behalf of my client, Michael Maietta, he wishes to withdraw his previously entered pleas of not guilty on four indictments and plead guilty on each and every one of those indictments to various counts covering those indictments and I will try to capsulize what we discussed at the bench.

On indictment 10082 of 90 at this time has authorized me to enter plea of guilty to burglary in the third degree, section 140.20 of the Penal Law, a class D felony to cover each and every count in that indictment.

On Indictment No. 6251 of 1990, my client has authorized me to enter a plea of guilty to criminal possession of stolen property in the third degree, a class D felony, to cover the indictment.

Under number 9570 of 1990, Mr. Maietta has authorized me to enter a plea of guilty to attempted burglary in the third degree.

On indictment number 6251 of 1990, my client has authorized me to enter a plea of guilty to criminal possession of stolen property in the third degree, a class D felony, to cover that indictment.

Under Indictment No. 9570 of 1990, Mr. Maietta has authorized me to enter a plea of guilty to attempted burglary in the third degree, a class E felony, 110 / 140.20.

And finally, on indictment number 6820 of 1990, my client has authorized my to enter a plea of guilty to attempted burglary in the third degree, a class E felony to cover each and every one of the counts in that indictment.

It is further understood, Your Honor, by that plea Mr. Maietta will receive a sentence, the maximum of which on the two E felonies will be one and a half to three, since Mr. Maietta is a predicate felon on a previous occasion, on the two D felonies, two and a half to five years, those counts to run consecutive to the two E felonies, for a total sentence of four to eight with the understanding, Your Honor, being that Mr. Maietta will receive a sentence of four to eight provided in the next three months he is not arrested for any further crimes.

THE COURT: And he appears.

MR. BUCHICCHIO: And he appears.

THE COURT: And he cooperates with probation.

In the event that he violates, he is going to get maximum sentence allowed under the law under each of the pleas that he has entered to run consecutively and whatever that adds up to, that is what he's going to get so for instance on the D felony, seven years, on the E felony four years, that is 11 years, on the D felony, it is another seven years, that is 18 years, and on the E felony, it is another four years, that is 22 years in jail.

MR. BUCHICCHIO: Wait, I would just like to stop there. If -- I don't presume my client to be arrested ever again, however, there has been occasions where police officers from the 49th Precinct, where he has been arrested, and the case was dismissed within three days later of his arrest because of the exposure that he has had --

THE COURT: If he gets arrested and the case is dismissed within three days of the arrest, I assure you will not fulfill that. The promise that I'm making to you, three days after his arrest, if the case is dismissed, I will consider that case an erroneous arrest. Very well.

Counsel for Mr. Occhino –

MR. ANNUNZIATA: First of all with respect to 9570 of 90, Mr. Mangione (Phonetic) was assigned on that case, I have been retained so I ask that Mr. Mangione be excused and I be substituted.

THE COURT: You are substituted. Proceed.

MR. ANNUNZIATA: With regard to the three indictments, with regard to indictment 6251 of 1990 my client has authorized me to withdraw his previously entered plea of not guilty and enter a plea of guilty under the fifth count of this indictment to the crime of criminal possession of stolen property in the third degree, a D as in David felony, in full satisfaction of all of the charges contained on that indictment.

And with regard to indictment 9570 of 90, my client has authorized me to enter a plea of guilty to attempted burglary in the third degree, a class E felony, in full satisfaction of all of the charges contained thereon.

And with respect to indictment 10082 of 90, my client has authorized me to plead guilty to -- withdraw his previously entered plea of not guilty under that indictment and to enter a plea of guilty to the charges of burglary in the third degree a class E felony in full satisfaction of all of the charges contained on that indictment.

This is with the understanding, Your Honor, based on our conference at the bench with the assistant district attorney, that it is your Honor's intention to sentence him to one to three years concurrent on each of these indictment.

THE COURT: Thank you.

THE COURT: Is your name Michael Maietta?

DEFENDANT MAIETTA: Yes.

THE COURT: Is your lawyer Mr. Michael Buchicchio standing to your side?

DEFENDANT MAIETTA: Yes.

THE COURT: I didn't pronounce his name correctly but you know what I meant, Buchicchio.

MR. BUCHICCHIO: That is correct. Thank you.

THE COURT: Is that your lawyer standing by your side?

DEFENDANT MAIETTA: Yes.

THE COURT: Have you had an opportunity to speak to your lawyer about this case?

DEFENDANT MAIETTA: Yes, I have.

THE COURT: Have you told him everything there was to know about each of these four cases against you?

DEFENDANT MAIETTA: Yes, Sir.

THE COURT: Did you tell him the truth about each of these four indictments?

DEFENDANT MAIETTA: Yes, Sir.

THE COURT: You didn't leave anything out?

DEFENDANT MAIETTA: No, Sir.

THE COURT: He knows as much about each of these cases as you do, would that be fair to say?

DEFENDANT MAIETTA: Yes.

THE COURT: Your lawyer tells me you wish to plead guilty as follows:

Under Indictment No. 6251 of 90, to criminal possession of stolen property in the third degree, that is a class D felony, and a serious charge; under Indictment No. 9570 of 90 to the crime of attempt to commit the crime of burglary in the third degree, a class E felony, also a serious charge; on indictment number 10082 of 90, to the crime of burglary in the third degree, a class D felony; and under Indictment No. 6820 of 90, an attempt to commit the crime of burglary in the third degree, that is a class E felony, is that what you wish to do?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: Are you pleading guilty to each of these four serious felonies because you are guilty and for no other reason?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: Has anyone forced you to plead guilty?

DEFENDANT MAIETTA: No.

THE COURT: Has anyone threatened you in order to make you proceed guilty?

DEFENDANT MAIETTA: No.

THE COURT: Are you pleading guilty freely?

MR. MAIETTA: Yes, sir.

THE COURT: And voluntarily?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: And because you are guilty?

DEFENDANT MAIETTA: Yes.

THE COURT: By your plea of guilty under indictments 6251 of 90 to the crime of criminal possession of stolen property, in the third degree, do you admit sir that on or about June 26th, 1990, about ten o'clock in the evening, inside of 2407 Esplanade Avenue, that is a private house, that you did thereafter -- that you did possess something that you knew was stolen?

DEFENDANT MAIETTA: Yes, Sir.

THE COURT: What did you possess that you knew was stolen?

DEFENDANT MAIETTA: Motorcycle helmets.

THE COURT: What is it?

DEFENDANT MAIETTA: Motorcycle helmets.

MR. MUROFF: Judge, there was a great deal of property that was stolen there.

THE COURT: What about stereo equipment, phone equipment?

DEFENDANT MAIETTA: Yes, Sir.

THE COURT: And jewelry?

MR. MAIETTA: Yes, Sir.

THE COURT: All of that was stolen, is that correct?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: And you knew it was stolen; is that right?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: You didn't have permission or authority from the owner to possess that property?

DEFENDANT MAIETTA: No, sir.

THE COURT: And you knew each of these properties that was received from -- retrieved from your home pursuant to a search warrant and was possessed unlawfully?

DEFENDANT MAIETTA: Yes.

THE COURT: And you knew that property to be stolen?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: Under, indictment 9570 of 90, where you pled guilty to the crime of attempt to commit the crime of attempt burglary in the third degree, a class E felony, do you admit, sir, that on or about November 15th, 1990, about 3:20 in the afternoon at 727 Throggs Neck Expressway, that you did enter into that building with the intent to commit a crime; is that true?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: And indeed you went into that building and you stole certain property in that building, isn't that true?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: And under Indictment No. 10082 of 90 wherein you pled guilty to burglary in the third degree, do you admit, sir, that on or about November 12th, 1990, about three o'clock in the morning, at 1611 East 233rd Street, here in the City of New York, here in the Bronx, that you did enter into those premises?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: With the intent to commit a crime?

MR. MAIETTA: Yes, sir.

THE COURT: And were you accompanied by another person when you went into those premises?

Is that true?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: Who were You accompanied by?

MR. MAIETTA: Alfredo Occhino.

THE COURT: And when you entered into those premises, you stole certain property?

MR. MAIETTA: Yes.

THE COURT: What did you steal?

MR. MAIETTA: Cash.

THE COURT: Deli scale, cigarettes, is that true?

MR. MAIETTA: Yes, sir.

THE COURT: And under indictment number 6820 of 90, do you admit--wherein--where you pled guilty to attempt to commit the crime of burglary in the third degree, a class E felony, do you admit that on or about August 24th, 1990, at about two o'clock in the morning, at St. Ann's Avenue, here in the Bronx, that you did enter into those premises and steal -- with the intend to steal something, and you did steal something, is that true?

MR. MAIETTA: Yes, sir.

THE COURT: What kind of store was this?

MR. MAIETTA: A cigarette warehouse.

THE COURT: And did you enter into those premises with the intent to steal property; is that true?

MR. MAIETTA: Yes, sir.

THE COURT: And you did steal property, is that true?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: All right.

Mr. Occhino, is that your true name?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Are you also known as Chino?

DEFENDANT OCCHINO: Yeah, they call me that.

THE COURT: Your real name is Occhino.

DEFENDANT OCCHINO: Yes.

THE COURT: Is your lawyer, Mr. Annunziatta, standing by your side?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Had you had a chance to talk to him about each of these three cases that are pending against you?

DEFENDANT OCCHINO: Yes.

THE COURT: Did you discuss each of these cases with him?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Did you tell him the truth?

DEFENDANT OCCHINO: Yes.

THE COURT: Did you tell him everything there was to know about each of these three indictments?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Didn't leave anything out?

DEFENDANT OCCHINO: No.

THE COURT: He knows as much about the case as you do, is that fair to say?

DEFENDANT OCCHINO: Yes.

THE COURT: Your lawyer tells me that you want to withdraw your pleas of not guilty and to plead guilty as follows.

Under 9570 of 90 to the crime of attempt to commit the crime of burglary in the third degree, a class E felony; and under Indictment No. 6251 of 90, to the crime of criminal possession of stolen property in the third degree, a class D felony; and under Indictment No. 10082 of 90, to burglary in the third degree, a class B felony; is that what you wish to do?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Are you pleading guilty to each of these three serious felonies because you are guilty and for no other reason?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Has anyone forced you to plead guilty?

DEFENDANT OCCHINO: No, sir.

THE COURT: Has anyone threatened you in order to make you plead guilty?

DEFENDANT OCCHINO: No.

THE COURT: Are you pleading guilty voluntarily and freely and because you are guilty?

DEFENDANT OCCHINO: Yes.

THE COURT: By your plea of guilty under indictment 6251 of 1990, do you admit, sir, that on or about

June 26th, 1990, about ten o'clock in the evening, inside of 2407 Esplanade Avenue, private house, that you did possess certain property, that you knew was stolen, is that true?

DEFENDANT OCCHINO: Excuse me, sir, Your Honor, that is the wrong address. It is 2405.

THE COURT: 2405 Esplanade Avenue, okay?

DEFENDANT OCCHINO: Yes.

THE COURT: Inside of those premises, did you possess certain property that you knew was stolen?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: What did you possess?

DEFENDANT OCCHINO: Car radios, helmets.

THE COURT: Fifty thousand dollars worth of jewelry, stereo equipment, phone equipment?

Is that true?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: And you knew that was stolen?

DEFENDANT OCCHINO: Yes.

THE COURT: Were you a co-defendant with Mr. Maietta on those cases?

DEFENDANT OCCHINO: On that case, yes.

THE COURT: You had a crime partner with you on that occasion, is that true?

DEFENDANT OCCHINO: Yes.

THE COURT: The person that was your partner.

DEFENDANT OCCHINO: Yes.

THE COURT: Who was it?

DEFENDANT OCCHINO: Michael Maietta.

THE COURT: Mr. Maietta, is it true?

DEFENDANT MAIETTA: Yes.

THE COURT: By your plea of guilty under Indictment No. 9570 of 90, wherein you pled guilty to attempt to commit the crime of burglary in the third degree, do you admit that on November 15, 1990 at about 3:20 in the afternoon, at 727 Throggs Neck Expressway, that you did, while acting together with another person, enter into those premises with the intent to commit a crime, is that true?

THE DEFENDANT: Yes, sir.

THE COURT: And you did steal certain things from those premises, isn't that true?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: And you had a crime partner with you on that date?

DEFENDANT OCCHINO: Yes.

THE COURT: Among other people, who else was there?

DEFENDANT OCCHINO: Michael Maietta.

THE COURT: Was that true, Mr. Maietta?

DEFENDANT MAIETTA: Yes.

THE COURT: He was your partner in crime?

DEFENDANT MAIETTA: Yes.

MR. MUROFF: There were two others as well.

THE COURT: I said amongst others.

MR. MUROFF: My apologies.

THE COURT: You entered into those premises to commit a crime thereon?

DEFENDANT OCCHINO: Yes.

THE COURT: Finally, on 10082 of 90, wherein you pled guilty to burglary in the third degree, do you admit that on or about November 20th, 1990, about 3:20 in the morning at 1611 East 233rd Street here in the Bronx, that you again had a crime partner with you on that date, is that true?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Were you acting in concert with another person, is that true?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Who was that?

DEFENDANT OCCHINO: Michael Maietta.

THE COURT: Is that true, Mr. Maietta?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: Did you on that date and time and place, acting with Mr. Maietta, enter into premises to commit a crime thereon, is that true?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: What kind of premises?

DEFENDANT OCCHINO: That is when we hit a deli, delicatessen.

THE COURT: You broke in and stole certain property in that delicatessen, is that true?

DEFENDANT OCCHINO: Yes.

THE COURT: While acting together with Mr. Maietta?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Mr. Maietta, and Mr. Occhino, do you understand that you are giving up certain rights when you plead guilty, you understand that Mr. Maietta?

DEFENDANT MAIETTA: Yes.

THE COURT: You understand that, Mr. Maietta, do you understand?

DEFENDANT MAIETTA: Yes.

THE COURT: Do you understand that, Mr. Occhino?

DEFENDANT OCCHINO: Yes.

THE COURT: You are giving up that right to have this case tried before a jury of twelve people.

In your case Mr. Maietta, you are giving up four separate trials before four separate juries; did you understand?

DEFENDANT MAIETTA: Yes.

THE COURT: Mr. Occhino, you are giving up three separate trials before three separate juries, do you understand?

DEFENDANT OCCHINO: Yes.

THE COURT: You are giving up your right to have the jury decide at the end of the entire cases after they are tried whether you are guilty or not guilty and that decision by the jury would have to be unanimous in each of the cases; do you understand that.

DEFENDANT OCCHINO: Yes.

DEFENDANT MAIETTA: Yes.

THE COURT: Mr. Occhino?

DEFENDANT OCCHINO: Yes.

THE COURT: You are giving up your right to have me tell each of these juries that you are presumed innocent and the People would have to prove your guilt beyond a reasonable doubt, that is a very high standard of proof, you; do you understand that?

DEFENDANT MAIETTA: Yes.

DEFENDANT OCCHINO: Yes.

THE COURT: You are giving up your right to see the witnesses that will be produced against you during each of these four separate trials, Mr. Occhino?

DEFENDANT OCCHINO: Yes.

THE COURT: Under your three trials, do you understand that Mr. Occhino?

DEFENDANT OCCHINO: Yes.

THE COURT: Mr. Maietta, under your four trials.

MR. MAIETTA: Yes.

THE COURT: You are giving up your rights to have your lawyers examine the witnesses, that is examine them to see if they are reliable, trustworthy and truthful.

MR. MAIETTA: Yes, sir.

THE COURT: You are represented by one of the best lawyers in the business, do you understand that?

DEFENDANT MAIETTA: Yes.

THE COURT: You are giving up your right to have your lawyer question those witnesses, that is a substantial right that you have and you are giving that up; do you understand?

DEFENDANT MAIETTA: Yes.

THE COURT: Mr. Occhino, you are represented by a private lawyer who's a good lawyer, you are giving up your right to have your lawyer question the witnesses to find out if they are reliable and truthful and it trustworthy; do you understand that?

DEFENDANT OCCHINO:. Yes.

THE COURT: You are giving up your right to have me decide if any of the property that was taken from you by the police, if any of the entries by the police into any apartment by a search warrant or otherwise, any statement that you made to the police, if any identification that was made of you, if you're arrest itself in each of these several cases was legal or if any of those procedures violated your rights because you are pleading guilty, you are giving up your

right to have me decide those issues; do you understand Mr. Maietta?

DEFENDANT MAIETTA: Yes.

THE COURT: Mr. Occhino?

DEFENDANT OCCHINO: Yes.

THE COURT: You are also giving up your right to have your lawyer prepare and present any defense you may have to any of the charges that are pending against you, that is any of the indictments pending against you, do you understand that Mr. Maietta?

DEFENDANT MAIETTA: Yes.

THE COURT: Do you understand Mr. Occhino?

DEFENDANT OCCHINO: Yes.

THE COURT: Mr. Maietta, I told your lawyer under your pleas of guilty to criminal possession of stolen property in the third degree I am is sentencing you to prison for five years, setting a minimum term of two and a half years; under indictment 9570 of 90 wherein you pled guilty to attempt to commit burglary in the third degree, a class E felony, and under indictment number 6820 of 90, where you pled guilty to the same crime, I'm sending you to state's prison for a minimum of one and a half to three years, do you understand?

DEFENDANT MAIETTA: Yes.

THE COURT: Under indictment 10082 of 90 where you pled guilty, to two and a half to five, do you understand that, burglary two?

DEFENDANT MAIETTA: Yes.

THE COURT: I've told your lawyer and I'm telling you now on all of these cases, I'm going to run all of the cases concurrently or concurrent as the case may be to the maximum term you will do so the minimum term you will do in jail is eight years, the minimum will be four years, do you understand that?

DEFENDANT MAIETTA: Yes.

THE COURT: Except that promise of four to eight is conditioned upon three very important conditions, you

can not be rearrested between now and the date of sentence which will be June 27th, 1991, do you defendant?

DEFENDANT MATETTA: Yes.

THE COURT: You are a professional burglar, sir, so if you don't get out of your profession and you get arrested again, instead of get being four to eight, I will give you a total time in jail which will come to 22 years in jail, do you understand that?

DEFENDANT MAIETTA: Yes.

THE COURT: You will not be permitted to withdraw your plea pleas of guilty, you will not be permitted to go to trial, you will just get an enhanced sentence of 22 years in State's prison, do you understand?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: Do you want to ask me any questions?

DEFENDANT MAIETTA: No, sir.

THE COURT: Of course if you appear and don't get arrested I will give you four to eight.

DEFENDANT MAIETTA: Yes.

THE COURT: Mr. Occhino, I'm telling --I told your lawyer and I'm telling you now I will give you one to three years on each to run concurrent with each other, however, if you get arrested, if you get arrested because you are also a professional burglar, instead of getting one and a half to three--you don't have to be convicted, you just get arrested I will give you the full sentences under your pleas of guilty to the crime of burglary in the third degree, one and a third to four years; under your plea of guilty to criminal possession of stolen property in the third degree, going to get two and a third to seven years; under your plea of guilty to burglary in the third degree, I will give you two and a third to seven, each of the sentences will run consecutively with one another, so that instead of getting one to three, you are going to get a total time in jail of 18 years in jail, do you understand that?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: Seven, seven and four is 18 years in jail. You won't be permitted to withdraw your pleas of

guilty, you won't be permitted to go to trial, you're just going to get an enhanced sentence; is that clear, okay?

DEFENDANT OCCHINO: Yes, sir.

THE COURT: You want to ask me any questions about anything we just discussed?

DEFENDANT OCCHINO: No, sir.

THE COURT: You want to ask my any questions about it?

DEFENDANT MAIETTA: No, sir.

THE COURT: Of course if you show up and you are not rearrested I will give you one to three.

Are the pleas satisfactory to the People?

MR. MUROFF: Yes, they are.

THE COURT: Take the pleas.

THE CLERK: Is your name Michael Maietta?

DEFENDANT MAIETTA: Yes.

THE COURT: Is the gentlemen standing to your left, Mr. Buchicchio, your attorney?

DEFENDANT MAIETTA: Yes.

THE CLERK: Mr. Maietta, is it now your desire to withdraw your previously entered pleas of not guilty and under indictment 6251 of 90, plead guilty to criminal possession of stolen property in the third degree in full satisfaction of that indictment; and under indictment 6820 of 90, you wish to plead guilty to attempt burgiary in the third degree if full satisfaction of that indictment; and under indictment 10082 to 90, do you wish to plead guilty to burglary in the third degree, in full satisfaction of that indictment and under indictment of 9570 of 90, do you wish to plead guilty to attempted burglary in the third degree in full satisfaction of that indictment?

DEFENDANT MAIETTA: Yes.

THE COURT: Is that what you wish to do, sir, plead guilty under each of the four indictments?.

MR. MAIETTA: Yes, sir.

THE COURT: The pleas are entered.

THE CLERK: Is your name Alfred Occhino?

DEFENDANT OCCHINO: Yes.

THE CLERK: Is the person standing to your left, Mr. Albert Annunziata, your lawyer?

DEFENDANT OCCHINO: Yes.

THE CLERK: Is it your desire to withdraw your previously enters pleas under Indictment No. 10082 of 90, and plead guilty to burglary in the third degree in full satisfaction of that indictment; under indictment 9572 of 90, you wish to plead guilty to attempt burglary in the third degree in full satisfaction of that indictment; and under 6251 of 90, do you wish to plead guilty to criminal possession of stolen property in the third degree, in full satisfaction of that indictment; is that what you with do, sir, plead guilty under all three indictments?

DEFENDANT OCCHINO: Yes.

THE COURT: Pedigrees, please.

THE COURT OFFICER: Defendant gives his true name as Michael Maietta resides at 2547 Yates Avenue, Bronx, New York, date of birth is 6 / 2 / 62.

Defendant gives his name as Alfredo Occhino, resides at 2405 Esplanade Avenue, Bronx, New York, 4 / 30 / 65 date of birth.

THE COURT: Arraign the defendant Maietta as a predicate felon.

THE CLERK: Is your name Michael Maietta?

DEFENDANT MAIETTA: Yes.

He has my wrong address, 2721 Herring Avenue, Bronx, New York.

THE CLERK: Is your name Michael Maietta?

DEFENDANT MAIETTA: Yes.

THE CLERK: The district attorney of Bronx County has filed with this Court an information accusing you of being a predicate felon in that on the third day of December, 1985, in Queens Supreme Court, Queens County, before the Honorable Justice of the Supreme Court therein, you were in due form of law convicted of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized, to wit, grand larceny in the second degree.

And that thereupon on the third day of December of 1985, you were duly sentenced to two to four years incarceration.

You have a right to controvert the statements, you also have a right to challenge the alleged predicate conviction, felony conviction, in that it was obtained in violation of your constitutional rights. Any allegation not specifically denied by you at this time is deemed admitted. Any challenges not specifically raised is deemed waived.

Have you had an opportunity to speak to your lawyer who's standing next to you.

MR. BUCHICCHIO: I was the attorney for Mr. Maietta on that matter in Queens and I can state for my client that for the record, that he is in fact a predicate felon.

THE COURT: Do you admit that?

DEFENDANT MAIETTA: Yes, sir.

THE COURT: Proceed.

THE CLERK: Do you wish to deny any allegation contained in this?

DEFENDANT MAIETTA: No.

THE CLERK: Do you wish to the challenge the constitutionality of this felony conviction?

Do you?

DEFENDANT MAIETTA: No.

THE COURT: The defendant is adjudicated a predicate felon.

I am warning you both, you get arrested again, not convicted but arrested again, you face significant time in jail.

Is that clear, Mr. Maietta?

DEFENDANT MAIETTA: Yes.

THE COURT: Mr. Occhino?

DEFENDANT OCCHINO: Yes.

MR. BUCHICCHIO: And with that last caveat, you have deemed them professional burglars and there may or may not be previous crimes out there that may perhaps at this time be unsolved --

THE COURT: I mean any additional acts from this point on.

MR. BUCHICCHIO: Thank you.

THE COURT: That should lead you on to some fruitful grounds, Mr. Muroff.

June 27th, bail continued.

* * * *

The above is Certified to be a true and accurate transcription of the within stenograph minutes.

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JEFFREY GORO, RPR
SENIOR COURT REPORTER

[MINUTES OF SENTENCING HEARING]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM PART 28

THE PEOPLE OF THE
STATE OF NEW YORK — Indictment No.

9570-90
- against - 6251-90
6820-90
10082-90

MICHAEL MAIETTA, — SENTENCE

Defendant[s].

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851 Grand Concourse
Bronx, New York 10451

MAY 2, 1991

B E F O R E :

HONORABLE GERALD SHEINDLIN,

J u s t i c e

A P P E A R A N C E S

ROBERT T. JOHNSON, ESQ.
District Attorney, Bronx County
BY: JOSEPH MUROFF, ESQ.,
Assistant District Attorney

MICHAEL F. BUCHICCHIO, ESQ.,

Attorney for Defendant

MAUREEN NEVILLE, C.S.R.,
SENIOR COURT REPORTER

COURT CLERK: Numbers 5, 8, 9 and 10 on the part 28 calendar, Indictments 9570 of 90, 6251 of 90, 6820 of 90 and 10082 of 90, Michael Maietta.

Appearances, please.

MR. BUCHICCHIO: Michael F. Buchicchio, 700 White Plains Road, Scarsdale, New York for Mr. Maietta.

MR. MUROFF: Joseph Muroff for the People.

THE COURT: Arraign him for sentence, please.

COURT CLERK: Please rise.

(Defendant complies.)

COURT CLERK: Is your name Michael Maietta?

THE DEFENDANT: Yes.

COURT CLERK: Mr. Maietta, is Mr. Buchicchio your attorney?

THE DEFENDANT: Yes, sir.

COURT CLERK: Mr. Maietta, you're being arraigned for sentence following your four pleas of guilty, to wit: Under indictment 6251 of 90 to criminal possession of stolen property in the third degree; under indictment 9570 of 90, attempted burglary in the third degree; under indictment 10082 of 90 to burglary in the third degree; and under indictment 6820 of 90 to attempted burglary in the third degree.

Before imposing sentence the Court will accord the District Attorney an opportunity to make a statement with respect to any matter relative to the question of sentence; your attorney, Mr. Buchicchio, will then be accorded an opportunity to speak on your behalf; and you, sir, have an absolute right to make a statement in your own behalf if you so wish.

Do the People wish to be heard?

MR. MUROFF: Yes, Judge. I hope that the Court and defense counsel will bear with me for a few minutes while I just make this statement.

Standing before you Mr. Michael Maietta is a criminal in the truest sense of the word. His actions speak of greed

and satisfaction of whatever drug problem may or may not be. The probation report I understand alludes to a drug problem.

The point here is this, is what Mr. Maietta does for a living, he commits burglaries. In fact, he was part of a ring of burglars in which, he was allegedly the so-called ring master. These group of burglars included childhood friends and family members. At one time or another he's been arrested and charged with Louis Maietta, who is his brother, who is presently under indictment in part 21, Alfredo Occhino, John DeFonzo, who your Honor is familiar with, another individual by the name of Anthony Salveggi, who is under indictment in part 21, and others. All of them have records as burglars and thieves.

This was allegedly not a rinky-dink organization. These burglaries were planned in advance deviously and selfishly. The burglars were equipped with police scanners so as to monitor police frequencies before the burglaries were committed. The police would receive calls on the 911 phone misdirecting them to go to other locations. Rather than using their own vehicles, they steal vehicles of others and commit the burglaries, drop the property, ditch the stolen car, come back around an ultimately fence the property.

Now everything I've just stated is not inapplicable, these factors are in one way or another part of each and every indictment that Mr. Maietta plead guilty to back on March 11th.

According to sources, at least one of them being part of Maietta's own gang, the group was committing three or four burglaries a day in the Bronx and Westchester Counties even after March 11th when this defendant took the plea. But, Judge, you don't have to rely on this particular piece of information because in front of you you have a copy of an indictment against Mr. Maietta from Westchester County concerning a burglary which occurred only weeks after the pleas in your part.

As to the pleas, Judge, the defendant plead guilty to two "D" felonies and two "E" felonies. Three of the four pleas were the lesser charges than those contained in the respective indictments. Your Honor could not have been more clear as

to the consequence for this defendant if he violated any of the conditions you set. You allowed him to remain out pending a promised sentence of a total of four to eight years and just as much as a promise of four to eight was the alternative promise of consecutive sentences of three and-a-half to seven on two "D" felonies and two to four on two "E" felonies, representing a total time of eleven to 22 years if this defendant continued to practice his trade.

Judge, just a few more things I want to say about his trade before I conclude. This defendant can't even begin to imagine, although he should, the lives he's negatively affected in his wanton pursuit of things not his. For example, one of the indictments, 6251 of 90, concerns a series of events that took place on June 26th, 1990. On that date three separate apartments at the same location were broken into in the morning, a lot of jewelry and personal items were taken from these apartments. Also in the vicinity a car was found, a car that was reported stolen was found abandoned and that car was identified as a car that was used in these three burglaries.

Shortly thereafter, Mr. Maietta and Mr. Occhino are in the vicinity of Mr. Occhino's home when they are seen with the same black bag that was seen carried by the perpetrators that committed the burglaries earlier that morning and in the home in which Mr. Maietta took refuge in at the time the jewelry was later recovered pursuant to a search warrant, that jewelry belonged to the complainants of the burglaries that very same day.

Also, in that home, Mr. Occhino's home in which Mr. Maietta took refuge, were stereo equipment and some 34 motorcycle helmets and motorcycle equipment and jewelry and helmets and v.c.r.'s and assorted other equipment. Each one of those pieces of property had a complainant attached to them.

Curiously enough, although Mr. Maietta was also indicted for the three burglaries on that particular day and another burglary two weeks earlier in which there were circumstantial evidence to tie Mr. Maietta into the case, all of the property that was in Mr. Occhino's home that Mr. Maietta took refuge in, and which Mr. Maietta plead guilty on one

indictment to the possession of stolen property that was in that home, all of that property was property from burglaries. We're not talking a minimum amount of burglaries. We're talking, we're talking at least 20 or 30 burglaries. Some of them Mr. Maietta was indicted based on possession of stolen property.

Each one of those complainants in these assorted burglaries has a different story to tell and I'm not going to tell their stories, but I want the Court to know there are stories behind each and every one of those burglaries. In the case of the motorcycle helmets, the Suzuki dealership had to close for days and lost thousands and thousands of dollars as a result of the burglary and those helmets from that Suzuki dealership on Blondell Avenue are sitting in Mr. Occhino's home in which Mr. Maietta seeks refuge. Also numerous amounts of the jewelry had sentimental value to these complainants, there were wedding rings included in those burglaries. These people all had to come to the 49th precinct to identify the warehouse full of property that was in that home that day.

And I just bring this up to portray to the Court the fact that although these are indictment numbers and we're talking statistics as to how many indictments Mr. Maietta is now facing, there are people behind the charges. I'm sure your Honor is aware of that. But I felt compelled to talk about that.

Aside from that, Mr. Maietta didn't really discriminate as to who he burglarized. They were neighbors, they were merchants. One of the indictments was a deli. 10082 of 90, concerned deli up in the two hundreds in Bronx county, Imperial Deli. The place was trashed. Police officers out on patrol saw Mr. Maietta and Occhino running from the deli at two or three o'clock in the morning. The place was trashed, food was thrown about, machines were tossed over, counters were tossed over, just total disregard of these people's lives and these people's property.

Judge, I recommend, having said what I've said, that your Honor fulfill the alternative promise that you made to this defendant and that you sentence this defendant to the maximum of three and-a-half to 7 on the two "D" felonies and two to four on the two "E" felonies for a total of eleven to 22

years. And I would point out to the Court that if this defendant were convicted of the four indictments of the higher charges which he did not plead guilty to, he'd be facing an even greater amount of time.

THE COURT: Thank you, Mr. Muroff.

Mr. Buchicchio.

MR. BUCHICCHIO: Your Honor, I'm going to ask the Court's indulgence and ask my client to sit down because I intend to be a while. I'm sure Larry Davis who got 12 and-a-half to 25 years for committing murder as a convicted murderer who talked for an hour, that I can talk on behalf of Mike Maietta for at least a half hour who is going to face almost as much time for burglary in this county.

THE COURT: Larry Davis, sir, got 25 to life consecutive to five to 15, so he's doing a minimum of 30 years to life.

MR. BUCHICCHIO: For murder, your Honor.

Your Honor, Mr. Muroff has indicated to this Court various allegations that are not before this Court. That has been the tactic of Mr. Muroff throughout the proceedings in this case. He's injected his vindictiveness and overzealousness throughout these proceedings. On each and every occasion when there was an opportunity to make a bail application, Mr. Muroff did so being rejected on each and every occasion. I'm not going into personalities at this particular juncture. I'll leave that issue for an Appellate Court to look at as I will present facts that I've had made known to me during the course of this particular proceeding.

As far as the Imperial Deli case, indictment eleven 82 of 90, Mr. Maietta plead guilty to an "E" felony. That was a commercial burglary --

THE COURT: Ten thousand 82 of 90.

MR. BUCHICCHIO: 10082 of 90 was a commercial burglary. There was no damage to any person. No one was injured. There was no violence.

Your Honor, I want to present for the purposes of this sentence four photographs that were taken of my client after he was beaten by the police after his arrest on that particular case because it is my assertion that in that particular case that Michael Maietta was never found anywhere near the scene of

that crime, in fact he was some two hundred feet away. The police saw him hiding behind a dumpster, grabbed him, said confess to this crime and proceeded to beat him up. Those pictures were shown to the judge and he was released in his own recognizance in that case.

I'd like those marked exhibits A, B, C and D for the purpose of this sentence.

THE COURT: Deemed marked A, B, C and D. Proceed.

MR. BUCHICCHIO: Indictment 9570 of 90, your Honor, my client plead guilty to an "E" felony. That was a commercial burglary of a warehouse over on Throgs Neck Avenue in Bronx that has been abandoned for some five years in which my client with three other people were seen taking piping from an empty building which in most instances in this county would be considered a criminal trespass, petty larceny and it would be a misdemeanor.

In indictment number 6820 of 90, Mr. Maietta was found allegedly inside a warehouse, another commercial residence, no one is home, no one's personal place of residence, where he was found smoking a joint with another one of his friends, and again if that case went to trial, it would probably be a trespass.

The only case Mr. Muroff alleges involved residential burglaries is a case, 6251 of 90, a burglary that took place on June 26th, in which there was absolutely no witnesses to the crime, not one who said that Michael Maietta was seen coming out of the any of the apartments that were allegedly burglarized on that day. He was seen some 45 minutes later by plain clothes policemen from the local precinct who saw him in the presence of another defendant, Mr. Occhino, who said: Hey you guys, come here. And Mr. Maietta, knowing what cops do to him every time they see him, ran. He ran into the home of his friend Alfredo Occhino in whose house, your Honor, was found the alleged proceeds of a burglary. I think what Mr. Muroff was saying is his refuge in someone's house is circumstantial proof that person knows what is in that home and he thought he could prove it to the Court. I know he couldn't prove it to a jury that Mr. Maietta would have known

because he went into the home that day that all the stolen property was in that home. Mr. Maietta was never charged with possession of police scanners, Mr. Occhino was in a separate count. Mr. Maietta was never charged with damage to any person, he was never charge with any crime of robbery or crimes of violence.

In his probation report Miss Hamilton indicates that Mr. Maietta is a danger to the community. I take umbrage with that particular statement. Mr. Maietta has never been convicted of any crime against a person. Miss Hamilton in her probation report does admit Mr. Maietta has been cooperative in making out this particular probation report. He cooperated and even seemed remorseful. She also indicated he had a drug problem for which he needed to supplement his salary for which he was working on various occasions, your Honor.

You know, your Honor, I've heard during the course of the proceedings earlier in this case by Mr. Muroff my client is a bumb [*sic*], he's a bad guy, a hoodlum, those are the type of words that Mr. Muroff has disparaged my client with. He's a D.A., he sits in the position of trying to protect the community, but I wish he would not lose sight of his objective in the future. Because although my client may be a bum in his eyes and bad guy, he does have another side, your Honor, a side I don't think today would be meaningful to this Court to try to palliate the crimes this Court is going to stand and sentence him on. But he is a loving and devoted son. His mother is here. He is a loving and devoted sibling. His brother and two sisters are here. He has a family.

I can say, your Honor, to digress on a personal point, Michael and I go back nine years, we know each other nine years. I've represented him on numerous occasions, most of those cases misdemeanor cases where he's gotten pleas and had violations and fines. But what I do want you to know for the record, your Honor, Mr. Maietta is a skilled carpenter, he put an addition and deck on my house in Westchester and people still compliment the craftsmanship and artisan work he did on that house. I wish he had honed those skills rather than fall victim to the drug problem which has beseeched him at this time. Had he stayed in this practice, he would have

been a successful contractor by this time. Unfortunately we want to but cannot help, we have to confront ourselves in the position he finds himself in now.

I want the Court to be mindful of the fact there is a pending case in Queens County, this Court was fully aware of at the time that Michael Maietta took his plea. If that court in its eminent wisdom felt because of the charges out in Queens they wanted to give him consecutive time out there, they could do so if Michael Maietta was found guilty and he was in fact guilty and the court sentenced him consecutively. I don't think this Court is going to have any deterrent affect by imposing a maximum in this case.

More importantly, your Honor, there is a case before this Court that Mr. Muroff has now made mention of, a case that came out of Yonkers, City of Yonkers, County of Westchester, for which there is an indictment before this Court, that is indictment 910652 filed in Westchester County. I want to go into that case a little, your Honor, because I believe that the entire purpose for this Court to enhance Mr. Maietta's sentence is the basis of that arrest and that indictment. And I want the Court to bear with me because this obviously is going to be the gravamen of our appeal when this Court imposes this sentence that I feel it will impose based on the representations made by the Court.

That case involves a burglary in Yonkers where a jeep being driven by someone other than Michael Maietta, which did in fact belong to Michael Maietta, was taken to a location in Yonkers, another person got out of that jeep allegedly kicked the door but never got into the dwelling of that particular residence, ran back to the jeep, told the driver don't leave, I'm almost in the house, and when he returned back to the scene of that residence there was a witness waiting by the door. The person who kicked the door in got into the jeep and both the driver and him fled down the Major Deegan to the Bronx.

I have a statement taken in my office signed by Anthony Salveggi which I want marked as Defendant's Exhibit E for the purpose of this sentence written by Anthony Salveggi who admits to me and will admit in open Court,

under oath in open Court, he was the driver of Michael Maietta's jeep on the date of March 28, 1991, the instance in which this indictment before the Court from Westchester County alleges that Mike Maietta was the driver. I want the Court to be mindful that that case in Westchester County with Mr. Muroff's intersession was presented directly to the Grand Jury which is very unusual in Westchester County, in most cases you get a felony hearing in Yonkers Court especially, your Honor, where the identification of allegedly Michael Maietta was based on a 20 second viewing of the person who happens to be a police officer in Yonkers, a 20 second viewing in a fleeing truck when one photograph of Michael Maietta was shown to this police officer. That's the case that was presented to the Grand Jury.

I not only have a statement by Mr. Salveggi who stated to me in my office in front of witnesses that he would testify in this court or in Westchester at a later time that he was in fact the driver of that truck which was in fact registered to Michael and that's how this all transpired, they popped the license plate, the plate came back to Mr. Maietta. Of course the police said he's a known burglar, a bum, a creep, he must be the guy who did it, get a picture, they bring it to the other police officer, says yeah, I can see this might be the guy. We got him on four indictments in the Bronx. He says that's the guy. Come on, Judge, don't be naive.

Not only do I have a witness who will testify to Mr. Maietta's not being there because he was there, I have three alibi witnesses, your Honor: Mr. Richard Losetto, wife Maria Losetto and a worker at the store which is Losetto Carpets in Bronx County where Mr. Maietta was working that entire time to help to defray the cost of the last proceedings which his mother has had to bear for the last six months. That's the case, your Honor which is going to enhance my client's sentence on a case to which he has plead not guilty, on a case where he has alibi witnesses, on a case where he was not found at the scene on the crime, on a case where he was identified by a police officer by a photograph where I have alibi witnesses.

Your Honor, I think you're making a grave injustice here. I'm not going to change your mind at this proceeding, I know that, but I do have to make my record and I honestly feel that your Honor is saying to my client because you're sentenced prisoner, because I conditioned my sentence on a promise that you made to me, I am withdrawing, I am suspending, I am taking away your right to a presumption of innocence, I'm taking away your due process because I am sentencing you based on the fact that you were arrested and indicted but you've plead not guilty. And the facts in this case are so weak that a reasonable person I believe would say, boy this is a weak case, should we sentence him to ten to 20 in a case like this. Let the Westchester Court, if he's found guilty, enhance the sentence and bang him with seven and-a-half to 15 at that time. Why should this Court be so concerned with sentencing Mr. Maietta on a case he hasn't even been found guilty of.

You know, your Honor, Justice Felix Frankfurter once said the safeguards of liberty have frequently been forged on the history of not nice people. And Mr. Maietta has been called not a nice person by any stretch of the imagination by Mr. Muroff today. I just want to quickly show to the Court the case law concerning the issue of enhanced sentences and why I think if this Court goes along with the sentence its indicated to me it's going to impose, it will be reversed and at the very least a hearing will have to be held and the issue determined.

There's a case of People -v- Felix, 58 NY2d 156. That case your Honor, was a review of the statute 70.02 subdivision five of the Penal Law in which enhanced punishment was allowed to be imposed based on criteria of an armed robbery where a defendant only plead guilty to having committed robbery without a particular device. The court's language in that case your Honor is only important to my argument here today to show to this Court the following, and I'm quoting to the court:

Subdivision five of Section 70.02 of the Penal Law involves no new criminal charge, no separate statute, no new finding of fact on a distinct issue as the basis for increased

punishment. What it does rather is require as part of one statutory scheme that a defendant indicted for an armed felony but permitted to plead to a lesser offense be sentenced to an indeterminate term, while permitting imposition of a lesser sentence if after a hearing the sentencing judge finds the existence of one of the ameliorating factors it specifies. By pleading to the class D violent felony with the knowledge that because the indictment charges an armed felony, the sentence on the class D felony will be indeterminate, the defendant in effect admits, for the purpose of sentence and subject to his right to a lesser sentence if the existence of one of the ameliorating factors be found by the court, that he was armed as charged in the indictment. He is, moreover, accorded the right to deny or explain which due process requires. Furthermore, the new facts found in the post-plea sentence only can reduce not enhance the penalty. The Court was giving effect to a case of U.S. -v- Stewart, 531 P.2d 326.

The Court went on to say that: Here the People's case has been sufficiently made by defendant's plea entered under this stature for by so doing he impliedly concedes being armed, as part of his plea bargain and subject to his right to present relevant information concerning possible deficiencies in proof of his commission of an armed felony or other specified circumstances bearing on commission of the crime to which he has pleaded.

What the Court is saying here, your Honor, and goes on to say is that due process protections apply to sentencing as well as to the trial itself but the due process clause should be not treated as a device for freezing the evidentiary procedure of sentencing in the mode of trial procedure.

What I'm saying to this Court is this Court is going to enhance my client's sentence based on not what the Court in Felix said was permissible, not on a separate statute, not on a new finding of fact, not on distinct issue as the basis for the increased punishment but what this Court will be doing today will be basing its enhancement on presumption of innocence taken away from my client and the fact you feel because he's indicted in Westchester County that is ground for you to give him a ten to 20 or eleven to 22 sentence. I think the law is

completely opposed to that theory and I hope that when the higher court sees this sentence it agrees with my position.

And I would call to the attention of the Court another case, People versus Banks, a Third Department case decided in May of 1990, the citation is 161 AD2d 957, where the sentence was vacated based on the fact that: It is true that the county court was at liberty to consider the defendant's arrest for possession of a stolen car as evidence of a criminal activity.

And the court should be mindful in that case the defendant was actually found in the stolen car by a police officer who testified that that defendant was in fact in the stolen car.

Offenses committed by a defendant even those for which he has not been convicted may properly be submitted to the court as factors which may be considered in imposing sentence. But the court said there that: There is no question that the court entirely relied upon the arrest in vacating the plea bargain and imposing a more severe sentence. County court thus deprived the defendant of his right to a meaningful opportunity to refute the single aggravating factor which influenced the court increasing his sentence.

That is what the court is relying on enhancing his sentence, a single factor, the indictment in Westchester County. The facts I've already gone into, how weak a case I believe that is.

Your Honor there are other cases, People -v- Hernandez, 155 AD2d 361, People -v- Caridi, 148 AD2 624; People V Harrison, 161 NY2d 550. In each and every one of those cases, your Honor, the Court allowed the defendant to admit or deny his guilt of the other crime before they used that sentence, before they enhanced that sentence based on the other crime. In two of those cases the defendants did not deny that they had committed those crimes. In the other one a hearing was held and after the hearing was held and a police officer put on the stand, the sentence that was enhanced was upheld.

Your Honor, in conclusion, I feel that this Court should, if it is not willing to impose a sentence of four to eight, allow my client to withdraw his plea. This will give Mr. Muroff his opportunity to convict him of four separate

indictments. He's wanted to put Mr. Maietta in jail for life anyway, let's see him try a couple of these rather great --

MR. MUROFF: Rather than interject

THE COURT: Please don't interrupt, Mr. Muroff. He didn't interrupt you.

MR. BUCHICCHIO: Please, let me finish.

MR. MUROFF; Very well.

THE COURT: Don't interrupt.

MR. BUCHICCHIO: So my first application -- you can just deny then as I go along -- is to allow my client to withdraw his plea, let him enter a not guilty plea and afford him an opportunity to go to trial with --

THE COURT: Motion most respectfully denied.

MR. BUCHICCHIO: In the alternative, your Honor, I'm asking this Court that if it sentences Mr. Maietta to the sentence it is talking about, 10 to 20, that at the very least it leave open the possibility that if Mr. Maietta is found not guilty on the case in Westchester County he be allowed to be brought back for sentence and the original four to eight be imposed.

THE COURT: Application is denied.

MR. BUCHICCHIO: Lastly, your Honor, I'm asking the Court to consider all of the factors that I've enumerated, to try to temper some fairness and compassion in this case and to sentence my client to the least possible sentence this Court feels is in accord with the law and the values that this Court feels are important.

THE COURT: Thank you, Mr. Buchicchio.

Mr. Maietta, you have a right to address the Court before I impose sentence on you. Do you wish to say anything to me, sir?

MR. MUROFF: Your Honor

THE COURT: Excuse me, Mr. Maietta, do you want to say Anything to me sir?

THE DEFENDANT: I'd like to say I plead guilty here because I was guilty, I will deny I was in White Plains which I had nothing do with and the only regret I feel is my family going through this but whatever happens, I'm going to deserve whatever happens so I have nothing more to say.

THE COURT: Thank you.

MR. MUROFF: Judge --

I don't need to listen.

MR. MUROFF: Judge, I must respond on the record to a few things --

THE COURT: No.

MR. MUROFF: -- personally said by Mr. Buchicchio.

THE COURT: I don't want to hear it.

MR. MUROFF: It will only a minute. Just to respond --

THE COURT: I don't want to hear --

MR. MUROFF: I would like to preserve it for Appellate review. If I could only have a minute of your time.

THE COURT: if you're going to comment on personal attacks made upon you by Mr. Buchicchio, it's made in the heat of battle. You're both extremely competent professionals, highly skilled, both of you are, and I don't want to hear anything further.

MR. MUROFF: Judge, just one statement so I can preserve it for Appellate review.

THE COURT: You have less than 30 seconds. Go ahead.

MR. MUROFF: Judge, after this defendant took the pleas and these pleas were taken as a result of a conference between Mr. Buchicchio and myself with my deputy bureau chief in our office and we worked out this plea arrangement, after the pleas were taken Mr. Maietta personally came up to me outside in the hallway and thanked me for my consideration in this case. I have consideration for what Mr. Maietta did and I have consideration for Mr. Maietta's family. I have the most consideration for Mr. Maietta's family. And the only thing I want to add is the only reason that bail was requested and an increase in bail was requested on each and every occasion was because on each and every occasion when Mr. Maietta made bail he would go out and another arrest was made and he would be brought back to court and I would be remiss if I didn't make a bail application on each and every occasion.

And as to Mr. Anthony Salveggi, I'd already stated, Judge, this is a person that is presently under indictment in part 21 and the People allege is part of Mr. Maietta's burglary ring.

THE COURT: Thank you, very much.

MR. MUROFF: I bear no grudge against Mr. Maietta personally.

THE COURT: Thank you.

There is no question but that when the Court entertained the acceptance of the defendant's pleas to four separate indictments I made it extremely clear that if the defendant was rearrested, rearrested I emphasize, not convicted, not indicted, not pursuant to a subsequent hearing, but rearrested period, that I was going to enhance his sentence and give him the maximum sentence allowed under the law. His only saving grace is the fact he didn't plead guilty to the top count of each of the indictments which would have increased the sentences an enormous amount of time in state's prison. But he was allowed because of the consideration of the District Attorney to plead guilty to the much lesser charges. I warned him in language that was so clear that when I re-read it I reminded myself to do it once again because it was so clear. Mr. Maietta understood fully what I was saying to him.

I was fearful and I was predicting when I took the plea that Mr. Maietta lacked self control, that he was a burglar by profession and I told him that on the record, this wasn't some secret thought that was going through my mind. I wanted him to know that I knew he was a professional burglar and that if I was going to allow him to stay out on the street and that if he was going to continue in his profession of burglary, that I was not going to give him four to eight, that I was going to give him a sentence which totaled a maximum of no less than eleven years and no more than 22 years. I told him that looking him right in the eye. His family was present. And most importantly Mr. Buchicchio, one of the most competent and professionally skilled lawyers in the business and one of the most highly respected lawyers in this business was here, and in fact we said to each other because Mr. Buchicchio being the good lawyer that he is said: Judge, suppose I'm able to get

the arrest dismissed in three days? I said: Counsel, if you're able to get the arrest dismissed, in three days, I assure you I will not consider it.

MR. BUCHICCHIO: I'm not that good, Judge, give me three months on this one, I'll get it dismissed.

THE COURT: Counsel, counsel.

MR. BUCHICCHIO: Sorry, Judge, I couldn't resist.

THE COURT: But you see the point I'm going to bring up is that this was so fully and carefully discussed, because it was a condition that may result in an increased sentence I wanted everyone to fully understand. I wasn't going to ambush anyone on the date of sentence. I was trying to change the conduct of your client, Mr. Buchicchio. Mr. Maietta, I was trying to get you out of your profession of burglar. But I was unsuccessful because not only were you arrested okay? where perhaps on occasion even though I make these strongest indications on sentencing, an arrest is still an arrest, and I look at it, at an arrest and sometimes I use it and sometimes I don't, it depends on my review of the quality of the arrest and some of the circumstances surrounding it before I actually use it as an enhancing factor despite the strong language that I use at the time that I accept the plea and condition it on another arrest.

However, in this case not only was the defendant arrested but he was subsequently indicted so that there is an additional filter for the quality of the arrest, and not only was he arrested and not only was he indicted, but he was arrested and indicted for things that he does professionally, burglary.

Accordingly, the Court is satisfied that the promise that was made at the time the plea was accepted was a promise that could have been accepted or rejected by the defendant. Indeed, it was something that was discussed. The condition of the promise was fully and completely and clearly discussed to the extent that I told the defendant that if he was rearrested, he will not be permitted to withdraw his plea of guilty, he will not be permitted to go to trial, I was going to give him an enhanced sentence. The defendant completely understood the conditions at the time he entered his plea. His plea was intelligently and knowingly and freely and voluntarily entered

at that time with the conditions. Mr. Buchicchio of course being the excellent lawyer that he is, understood the conditions.

And so we meet here again today on the of sentence with the defendant having violated an important condition of his plea. The Court intends to use that rearrest in imposing the sentence the Court will impose.

The Court is no longer bound by the indicated promise, and I'm saying a promise that was conditional of four to eight. And reading the defendant's record the Court agrees with the Probation Department's assessment that this defendant represents a danger to the community. No, he may not hurt people physically, but he certainly hurts people in other ways. His profession is that of being a burglar. He evidently cannot change his ways. There is indication that his ways will be changed in future. Accordingly, the Court views this as a person that must be incarcerated for a period of time in order to protect the community against the activities of this defendant. His only saving grace is that there is no violence in this case or in any of the cases apparently with which he was involved except for resisting arrest which evidently resulted -- I'm not judging that at all, but that was one of the allegations connected with the four exhibits that were introduced by counsel for the defense.

Under indictment number 6251 of 90 wherein the defendant plead guilty to criminal possession of stolen property in the third degree, a Class D Felony, the defendant is sentenced to state's prison for seven years and I'm setting a minimum term of three and-a-half years.

Under indictment number 9570 of 90 wherein the defendant plead guilty to an attempt to commit the crime of burglary in the third degree, a Class E Felony, the defendant is sentenced to state's prison for a term of three years; I'm setting a minimum term at one and-a-half years.

Under indictment number 10082 of 90 wherein the defendant plead guilty to burglary in the third degree, a Class D Felony, the defendant is sentenced to state's prison for seven years; I'm setting a minimum term of three and-a-half years.

Under indictment number 6820 of 90 wherein the defendant plead guilty to an attempt to commit the crime of burglary in the third degree, a Class E Felony, the defendant is sentenced to state's prison for three years; I'm setting a minimum term of one and-a-half years.

Each of these sentences shall run consecutively with one another and not concurrently so that the minimum term that this defendant shall spend in state's prison is no less than ten years and no more than 20 years. And the Court cautions the parole authority to view very carefully the release of this defendant because he remains a severe and constant danger to the community of Bronx County.

A one hundred fifty dollar mandatory surcharge is imposed under indictment number --

COURT CLERK: 6251 of 90.

THE COURT: -- 6251 of 90 and a two dollar victim service fee is also imposed under that indictment. On the other indictments the surcharge is waived.

Advise the defendant of his right to appeal.

COURT CLERK: You have a right to appeal the judgment of this Court. If you wish to appeal, you must do so within 30 days. If you cannot afford your own attorney, the Appellate Division will assign counsel and provide any necessary transcripts. Have you understood what has been said to you, sir?

THE DEFENDANT: Yes.

COURT CLERK: Mr. Buchicchio, will you remain on the case for 30 days?

MR. BUCHICCHIO: Yes, I'll be filing my notice of appeal within five days.

THE COURT: Thank you.

COURT CLERK: Let the record reflect that the defendant has been handed written instructions of his right to appeal.

THE COURT: Mr. Buchicchio, I'm going to file with the papers the indictment handed up in Westchester County as a result of this defendant's arrest subsequent to his plea of guilty as a court exhibit.

MR. BUCHICCHIO: Also file my statement from Mr. Salveggi. I believe you have it.

THE COURT: Yes, I do but it was original in its form.

MR. BUCHICCHIO: I want you to have the original. I have copies.

THE COURT: You're going to keep the copies?

MR. BUCHICCHIO: Yes. He's going to testify Judge, it's okay.

THE COURT: Do you want to give me a copy?.

MR. BUCHICCHIO: If you'll take the copy, I'd, rather give you the copy.

THE COURT: Yes, sir, I'll take the copy, sir. Let the record reflect that I did review the original statement including the photographs you handed up. Do you have copies of that, of the photographs?

MR. BUCHICCHIO: Those I don't have copies of. I'll maintain them and make copies at some point subsequent to today.

THE COURT: Thank you, sir.

CERTIFIED THAT THE FOREGOING is a true and correct transcript of the original stenographic minutes.

[PETITION FOR WRIT OF HABEAS CORPUS]

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Attorneys for Petitioner

PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254

Prisoner's Name:	Michael Maietta
Prisoner's Number:	91A9630
Place of Confinement:	Wende Correctional Facility, Alden, New York

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MICHAEL MAIETTA,

Petitioner,

-against- 94 Civ. 1592 (LMM)

FRANK IRVIN, Warden,
Wende Correctional Facility
Alden, New York,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

To the Honorable Lawrence M. McKenna, Judge of the United States District Court of the Southern District of New York:

Petitioner, Michael Maietta ("Maietta"), for his petition, states as follows:

INTRODUCTION

1. Maietta applies for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, on the grounds that he is unlawfully detained and restrained of his liberty by Respondent. Maietta is now in the custody of the Respondent at Wende Correctional Facility, a New York State correctional facility located in Alden, New York.

2. In 1991, Maietta entered into a plea agreement with respect to four indictments pursuant to which the trial court promised a sentences aggregating 4 to 8 years of imprisonment, in exchange for his plea of guilty. The judge conditioned the promised sentence on, among other things, Maietta's not getting re-arrested for any further crimes prior to sentencing. (A 41.)*

3. Between plea and sentencing, Maietta was, in fact, arrested charged with various criminal acts in Westchester County, and subsequently indicted. However, Maietta not only vehemently asserted his innocence of the charges and challenged the validity of the arrest, but offered to introduce

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* References to the Appendix to this petition are indicated by the initial "A" followed by the page number of the Appendix. The Appendix consists of the contents of the Record on Appeal before the New York Court of Appeals and contains true and complete copies of documents on file in the Courts below.

exculpatory evidence -- never refuted by the prosecution -- demonstrating that he was not involved in any way in the alleged incident. The trial court refused to receive any of the proffered evidence and proceeded to enhance Maietta's sentence to 10 to 20 years of imprisonment based solely on the challenged arrest record and indictment.

4. Maietta, by this petition, challenges this enhanced sentence on the ground that it was imposed without providing him with an opportunity to present evidence to rebut allegations of his involvement in the alleged crime, and without requiring the prosecution to prove by a preponderance of the evidence that Maietta breached the agreement.

JURISDICTION AND VENUE

5. Jurisdiction and venue in the Southern District of New York are invoked under 28 U.S.C. §§ 2254, 2241(d), and Local Rule 32(d) of the Southern and Eastern Districts of New York.

PROCEDURAL HISTORY

6. The New York Supreme Court, Bronx County, on May 2, 1991, entered the judgment and enhanced sentence under attack. (Sheindlin, J. at plea and sentence.) That court convicted Maietta, upon his pleas of guilty, of one count of criminal possession of stolen property in the third degree (N.Y. Penal Law § 165.50), two counts of attempted burglary in the third degree (N.Y. Penal Law §§ 110.00, 140.20), and one count of burglary in the third degree (N.Y. Penal Law § 140.20).

7. The trial court sentenced Maietta, as a second felony offender, to four consecutive, indeterminate terms of 3-1/2 to 7 years, 1-1/2 to 3 years, 1-1/2 to 3 years, and 3-1/2 to 7 years for an enhanced aggregate sentence of 10 to 20 years instead of the 4 to 8 years it had promised him.

8. The issue in this proceeding is whether the sentencing judge, having promised to sentence Maietta to an aggregate sentence of 4 to 8 years, and having allowed him to remain at liberty pending the imposition of sentence, and having conditioned the promised sentence on, among other things, Maietta not being re-arrested for further crimes prior to sentencing (A 41), committed constitutional error in enhancing Maietta's sentence without affording him a hearing to rebut the validity of the post-plea crime, or at the very least, granting him an effective opportunity to challenge the allegations, and without requiring the prosecution to prove that Maietta breached the plea agreement by a preponderance of the evidence.

9. This case arises out of four Bronx County indictments against Maietta:

(a) Maietta was indicted by a grand jury in Bronx County for three counts of burglary in the second degree and related crimes. (Indictment No. 6251/90, A 20-25.) There were no allegations that anyone was present in the dwellings referred to in the indictment, and Maietta was not charged with any crime of robbery, possession of weapons, or violence to any person. Maietta was not apprehended at the scene, and there were no eyewitnesses. (A 83-84.)

(b) Maietta was also charged in Bronx County Indictment No. 6820/90 (A 26-28) with burglary in the third degree, criminal mischief in the third degree, and possession of burglar's tools. There were no allegations that anyone was present in the building in question, that any property was taken, or that any attempt was made to take any property. Maietta had simply been found in a warehouse smoking marijuana with a friend. (A 83.)

(c) In Bronx County Indictment No. 9570/90 (A 29-31), Maietta was charged with burglary in the third degree and related crimes. This charge arose from the alleged removal of copper piping from an abandoned warehouse. (A 83.)

(d) Indictment No. 10082/90, also from Bronx County, charged Maietta with burglary in the third degree and related crimes. (A 32-35.) These charges arose out of a break-in at a delicatessen. The only person allegedly injured in connection with this crime was Maietta, who was beaten by the police after having been apprehended. (A 82.) Photographic evidence of the results of Maietta's beating was submitted to the court at sentencing. (A 110-11.)

10. On March 11, 1991, Maietta agreed to withdraw his prior pleas of not guilty as to each of the four indictments and to plead guilty to one count under each. (A 39-41.) As part of the plea agreement, the court promised to sentence Maietta to two terms of imprisonment of 1-1/2 to 3 years and two terms of imprisonment of 2-1/2 to 5 years. At sentencing, the court intended to have one 1-1/2 to 3 year sentence run consecutively with one 2-1/2 to 5 year sentence, and to have the remaining sentences of 1-1/2 to 3 years and 2-1/2 to 5 years run concurrently. (A 40-41, 62-63.) Thus, Maietta would receive, in the aggregate, a sentence of four to eight years imprisonment.

11. The driving force behind Maietta's decision to withdraw his not guilty plea was the promise of this reduced sentence. He fully intended to do everything in his power to ensure that the promised sentence would in fact be granted.

12. The court set forth three conditions under which the agreed-upon sentence would be imposed: Maietta was required (1) to appear for sentencing on the scheduled date; (2) to cooperate with the probation department; and (3) to avoid getting re-arrested for further crimes prior to sentencing. (A 41-42, 63-64.) The court stated that if Maietta breached any of the conditions he would not be able to withdraw his plea and would "just get an enhanced sentence of 22 years in State's prison . . . ." (A 63.) There is no dispute that Maietta fulfilled the first two of these conditions; only the third condition is in issue.

13. With respect to the third condition, the court had stated at the time of the plea that an "erroneous arrest" would not be considered a breach (A 42 (emphasis supplied)):

> [APPELLANT'S COUNSEL:] If -- I don't presume my client to be arrested ever again, however, there [have] been occasions where police officers from the 49th Precinct, where he has been arrested, and the case was dismissed within three days later of his arrest because of the exposure he has had --
>
> THE COURT: If he gets arrested and the case is dismissed within three days of the arrest, I assure you will not fulfill that. The promise that I'm making to you, three days after his arrest, if the case is dismissed, I will consider that case an erroneous arrest. Very well.

14. At sentencing, the prosecutor presented the court with Westchester County Indictment No. 91-0652 (A 76, 114-15), in which Maietta was charged with having committed burglary in the second degree and related crimes on March 28, 1991. Maietta maintained his innocence of the crimes charged in the Westchester indictment. (A 87-97, 98.)

15. The Westchester case concerned a burglary in Yonkers in which a Jeep owned by Maietta was alleged to have been involved. (A 87.) At sentencing, Maietta's counsel explained that the Westchester police had claimed that a person other than Maietta got out of the Jeep and attempted, unsuccessfully, to enter a residence by kicking in a door. (A 87-88.) When someone appeared at the door, the person who had kicked in the door and the driver fled in the Jeep. (A 88.) No one was apprehended at the scene of the crime, and Maietta was not arrested until one week after the alleged burglary (A 88, 116). As discussed at sentencing, Westchester police contended that Maietta was the driver of the Jeep based on an alleged 20-second viewing of the driver by a Yonkers

police officer who claimed to have seen the fleeing vehicle. (A 88-89.)

16. When the prosecution introduced evidence of this breach of the no-arrest condition, Maietta, through his counsel, vigorously challenged the validity of the arrest and the underlying crimes. He alerted the court to certain weaknesses in the allegations, including the fact that the Yonkers police officer who identified Maietta was merely shown a photograph, and did not identify him by means of a lineup or photographic array. (A 89.)

17. Furthermore, Maietta's counsel offered a statement signed by Anthony Salveggi (A 112-13), in which Salveggi stated that he, not Maietta, was the driver of the Jeep, and that Maietta had no involvement whatsoever in the Westchester incident. (A 89.) Counsel advised the court that Salveggi was prepared to testify as to the facts set forth in his statement -- facts that exculpated Maietta (A 89). In addition, Maietta's counsel informed the court that three witnesses were willing to testify that, at the time of the Westchester incident, Maietta was working with them at their carpet store in the Bronx (A 89-90).

18. The prosecutor did not contest any of the statements made by Maietta's counsel, nor did he offer any proof that Maietta was involved in the Westchester incident other than the facts of the arrest and indictment.

19. Maietta's counsel argued that enhancing sentence solely on the basis of the Westchester arrest and indictment would constitute a denial of Maietta's right to due process of law, and requested alternatively (a) that Maietta be sentenced to the promised term of 4 to 8 years (A 96), (b) that a hearing be held to examine the basis of the arrest and indictment (A 91-96), (c) that Maietta be allowed to withdraw his guilty pleas (A 96-97), and (d) that, if Maietta were acquitted of the Westchester charges, he be resentenced to 4 to 8 years

imprisonment. (A 97.) The court summarily denied all applications made by Maietta's counsel. (A 97.)

20. Notwithstanding the exculpatory offer of proof by Maietta's counsel, consisting of a signed statement of a participant in the Westchester incident who was willing to testify as to Maietta's innocence, and three additional alibi witnesses, and the absence of any factual presentation by the prosecutor in rebuttal, the court proceeded to enhance Maietta's sentence. (A 100.) The court further stated:

> [W]here perhaps on occasion even though I make these strongest indications on sentencing, an arrest is still an arrest, and I look at it, at an arrest and sometimes I use it and sometimes I don't, it depends on my review of the quality of the arrest and some of the circumstances surrounding it before I actually use it as an enhancing factor despite the strong language that I use at the time that I accept the plea and condition it on another arrest.
>
> However, in this case not only was the defendant arrested but he was subsequently indicted so that there is an additional filter for the quality of the arrest . . . .

(A 102-03.)

21. Maietta appealed his conviction and sentence to the Appellate Division, First Department. Through his appellate counsel, Maietta contended that the trial court erred by imposing the enhanced sentence solely on the basis of the record of arrest and indictment when Maietta denied involvement in the Westchester crimes.

22. The judgments were affirmed by a divided panel of the Appellate Division, First Department. People v. Maietta, 173 A.D.2d 17 (1991). Writing for the three judge majority,

Justice Ross (joined by Justices Sullivan and Asch) held that the imposition of the enhanced sentence was proper.

23. Justices Milonas and Smith (now of the New York Court of Appeals) dissented in part from the majority ruling, expressing an unwillingness to accept the mechanical approach embraced by the sentencing court and the Appellate Division majority. (A 14-15; 173 A.D.2d at 28-29.) On February 6, 1992, Judge Milonas granted Maietta leave to appeal to the Court of Appeals. (A 2.)

24. On March 23, 1992, following the Appellate Division's affirmance of his sentence and under pressure to go to trial on the Westchester indictment, Maietta pleaded guilty in Westchester County to burglary in the second degree (N.Y. Penal Law § 140.25), criminal trespass in the second degree (N.Y. Penal Law § 140.15), and criminal mischief in the fourth degree (N.Y. Penal Law § 145.00). He did so only because the agreement provided an indeterminate sentence of 5 to 10 years that would run concurrently with the 10 to 20 years he is currently serving in the instant case, and therefore would not result in any additional incarceration time. Having lost faith in the justice system, Maietta simply desired to minimize the risk of significant additional prison time. Although Maietta maintains his innocence in the Westchester case, he pleaded guilty because he felt this was the only sensible decision under the circumstances. Maietta is presently serving both sentences.

25. Maietta then sought further review in the state's highest appellate court; the New York Court of Appeals. Counsel for Maietta argued for reversal on the grounds that the court improperly enhanced Maietta's sentence based solely upon the fact of the post-plea arrest and indictment, the validity of which was challenged at sentencing, and that the court's failure to afford Maietta the opportunity to present evidence to contest the validity of the arrest contravened fundamental principles of due process of law. Maietta argued for relief chiefly in the form of specific performance of the plea agreement and restoration of the promised sentence, and

alternatively, for a hearing where the prosecution would have to prove by a preponderance of the evidence that Maietta did, in fact, breach the no-arrest condition of the plea agreement.

26. The Court of Appeals affirmed the Appellate Division's order by a 5-0 vote. People v. Outley, 80 N.Y.2d 702 (1993). Writing for the court, Judge Hancock held that when there is an issue as to whether the defendant breached the no-arrest condition of a plea bargain by getting arrested, due process requires that the court conduct an inquiry where the defendant has an opportunity to show that the arrest is without foundation. The court opined that "the nature and extent of the inquiry -- whether through a summary hearing pursuant to Crim. Proc. L. § 400.10 or some other fair means -- is within the court's discretion." However, the Court concluded that the trial court never had taken sufficient steps to satisfy Maietta's due process rights. People v. Outley, 80 N.Y.2d 702 (1993).

27. Other than the above direct appeals, Maietta has filed no other proceedings with respect to this judgment in any court, state or federal.

28. This is Maietta's first habeas corpus petition.

29. Maietta has been represented by different counsel at different stages in the proceedings recounted above. A description of the nature and scope of Maietta's representation follows:

(i) In the Supreme Court, Bronx County, Maietta was represented by Michael Buchicchio, Esq., 700 White Plains Road, Suite 380, Scarsdale, New York, 10583.

(ii) On appeal to the Appellate Division, First Department, David H. Fromm, Esq., of Polatsek & Fromm, 405 Lexington Avenue, New York, N.Y. 10174, represented Maietta.

(iii) Present counsel represented Maietta on his appeal to the New York State Court of Appeals.

30. By this Petition, Maietta presents substantial and meritorious constitutional claims, each of which have been fully litigated in the state courts, for resolution for the first time by the Federal courts.

31. Maietta collaterally attacks this judgment and sentence pursuant to 28 U.S.C. § 2254. In this petition, for the reasons set forth below, Maietta's conviction and sentence were obtained in violation of his rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

CLAIM

32. All other allegations and factual matters presented in the petition and appendix are incorporated herein by specific reference.

33. At sentencing, the prosecution presented the court with a record of arrest and indictment as evidence that Maietta breached the condition of his plea agreement that he not get re-arrested for further crimes prior to sentencing. Maietta strenuously denied the prosecution's allegations of breach and challenged the validity of the arrest and indictment. Not only did Maietta adamantly assert his innocence of the underlying crime, but he offered to introduce evidence that, if received, would have raised a serious question regarding the validity of the charge against him and presented a genuine issue as to whether or not he breached the plea agreement, especially given the fact that the prosecution did not offer any evidence in rebuttal. Nonetheless, the court would not consider any of this offer of evidence, even after it promised that it was going to consider the "quality" of any post plea arrest before enhancing sentence. The sentencing court's failure to afford Maietta an opportunity to present

evidence to refute charges that he breached the agreement constituted a violation of due process.

34. Due process required the court to afford Maietta an evidentiary hearing to determine if there was such a breach. At the very least, the court was under a duty to ensure that Maietta had an effective opportunity to rebut the allegations that adversely affected his sentence. The sentencing court did neither, even in the face of all the evidence offered to it by Maietta. The court's actions did not meet the minimum requirements of fundamental fairness and due process and thus violated Maietta's Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution.

35. The sentencing court had to assure itself that the information it was relying on in fixing sentence was reliable and accurate as due process will not allow a convicted person to be sentenced on materially untrue information. The court should have required the prosecution to prove that Maietta breached the agreement by a preponderance of the evidence before it dishonored its promise. In order for the court, as the trier of fact, to "put the government to its proof," it had to consider Maietta's evidence as well as the prosecution's, as this was a necessary and indispensable step in concluding by a preponderance of the evidence that Maietta breached the agreement. Since it did not do this, it was impossible for the prosecution to meet its burden, and the court had no proper basis for its decision to enhance Maietta's sentence.

36. Because the enhanced sentence was unjustified, it constituted a breach of the agreement and a violation of Maietta's Fifth and Fourteenth Amendment Due Process rights. Maietta, as the non-breaching party, is therefore entitled to relief, and requests specific performance, as the breach went to the very "essence" of the agreement and is the only meaningful way for him today -- in light of his guilty plea in Westchester -- to receive the benefit of his bargain. Furthermore, as it was

Maietta's fundamental rights that were violated, his preferences should be given considerable weight.

37. An evidentiary hearing at this juncture would be an inadequate remedy for Maietta because it would allow the sentencing court to substantiate its decision to enhance Maietta's sentence, retroactively and long after the fact, by relying upon Maietta's guilty plea in Westchester County, which was precipitated by the very same fundamental due process violation committed by the sentencing court in sentencing Maietta, without any opportunity to be heard in mitigation, to an enhanced sentence of 10 to 20 years imprisonment.

38. Alternatively, Maietta should be allowed to withdraw his guilty pleas to remedy the court's violation of his due process rights.

REQUESTS FOR RELIEF

WHEREFORE, Petitioner, Michael Maietta, respectfully requests:

1. That a writ of habeas corpus be directed to Respondent Frank Irvin, Warden at Wende Correctional Facility;

2. That Maietta be granted relief in the form of specific performance of the plea agreement or, in the alternative, that Maietta be granted relief by allowing him to withdraw his plea;

3. That Maietta be allowed such other, further, and alternative relief as the court may deem just, equitable, and proper.

Dated: March 9, 1994

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for Petitioner

By: /s/ STEVEN C. KRANE
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 27, 1994

/s/ MICHAEL MAIETTA
MICHAEL MAIETTA